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No. 3663

1288

United States
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Circuit Court of Appeals
For the Ninth Circuit.

TISDALE I. VAN ATTA,

Plaintiff in Error,

vs.

THE MONTANA NATIONAL BANK, a Corpora-
tion,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Montana.

FILED
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CLERK

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Circuit Court of Appeals
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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Amended Complaint	2
Answer to Amended Complaint.....	6
Answer of Court to Writ of Error.....	127
Assignments of Error.....	112
Bill of Exceptions	40
Bond on Writ of Error.....	122
Certificate of Clerk U. S. District Court to Transcript of Record.....	127
Certificate of Judge to Bill of Exceptions.....	110
Citation on Writ of Error.....	124
Decision Denying Motion for New Trial.....	39

EXHIBITS:

Exhibit "A"—Bill of Sale from First National Bank of Forsyth to Bank of Montana, Billings.....	22
Exhibit "B"—Collateral Pledge Agreement, Dated July 27, 1915, W. F. Guy, to the Bank of Montana, Billings.....	23
Exhibit "C"—Mortgage, Dated June 12, 1914, from Louise Morley and Mike Morley to W. F. Guy and Tisdale I. Van Atta	24

Index.

Page

EXHIBITS—Continued:

Plaintiff's Exhibit No. 1—Letter, Dated April 1, 1920, Grimstad & Brown to T. F. McCue	44
Plaintiff's Exhibit No. 2—Notice of Demand of Notes, Dated March 29, 1920, T. F. McCue to Montana National Bank of Billings	42
Plaintiff's Exhibit No. 3—Registry Receipt, Dated March 31, 1920.....	43
Plaintiff's Exhibit No. 14—Receipt for Notes, Dated July 27, 1915, B. S. Langworthy to W. F. Guy and T. I. Van Atta	76
Plaintiff's Exhibit No. 15—Agreement, Dated July 27, 1915, By and Between Bank of Montana and Dr. W. F. Guy..	76
Plaintiff's Exhibit No. 19—Transfer and Delivery of Notes, Dated July 27, 1915, B. S. Langworthy to Bank of Montana	77
Plaintiff's Exhibit No. 20—Promissory Note No. 3741, Dated July 27, 1915, W. F. Guy to The Bank o Montana, Billings	79
Plaintiff's Exhibit No. 21—Promissory Note No. 2096, Dated September 28, 1914, T. I. Van Atta to Bank of Montana, Billings.	80
Plaintiff's Exhibit No. 22—Promissory Note No. 1638, Dated June 6, 1914, T. I. Van Atta to Bank of Montana, Billings	81

Index.

Page

EXHIBITS—Continued:

Plaintiff's Exhibit No. 23—Notice of Sale of Notes, Dated January 16, 1917, Montana National Bank to W. F. Guy.....	84
Plaintiff's Exhibit No. 24—Sheriff's Certificate of Sale on Foreclosure, Dated April 18, 1917.....	87
Plaintiff's Exhibit No. 25—Sheriff's Deed Dated May 8, 1918, Henry Grierson to Montana National Bank of Billings.....	90
Defendant's Exhibit No. 5—Letter, Dated August 27, 1916, T. I. Van Atta to B. S. Langworthy.....	47
Defendant's Exhibit No. 6—Letter, Dated August 17, 1915, T. I. Van Atta to Grimstad & Brown.....	48
Defendant's Exhibit No. 7—Letter, Dated August 14, 1915, Grimstad & Brown to T. I. Van Atta.....	51
Defendant's Exhibit No. 8—Letter, Dated August 14, 1915, Tisdale I. Van Atta to B. S. Langworthy.....	52
Defendant's Exhibit No. 9—Letter, Dated August 11, 1915, T. I. Van Atta, to Grimstad & Brown.....	53
Defendant's Exhibit No. 10—Letter, Dated August 31, 1916, Grimstad & Brown to T. I. Van Atta.....	55
Defendant's Exhibit No. 11—Transfer and Delivery of Property and Notes,	

Index.	Page
EXHIBITS—Continued:	
Dated March 22, 1915, Guy and Van Atta to First National Bank of For- syth.....	58
Defendant's Exhibit No. 12—Complaint..	60
Defendant's Exhibit No. 26—Collateral Pledge Agreement, Dated July 27, 1915, W. F. Guy to Bank of Montana, Billings.....	97
Judgment....	36
Names and Addresses of Attorneys of Record.	1
Order Allowing Writ of Error, Supersedeas and Fixing Bond.....	119
Petition for New Trial.....	38
Petition for Writ of Error.....	111
Praecipe for Transcript of Record.....	121
Reply to Answer.....	29
Stipulation Re Bill of Exceptions.....	109
TESTIMONY ON BEHALF OF PLAIN- TIF:	
GUY, DR. W. F.....	70
Cross-examination.....	96
VAN ATTA, TISDALE I.....	41
Cross-examination.....	46
Redirect Examination....	68
Recalled.....	99
Undertaking on Writ of Error....	122
Verdict and Record of Trial.....	34
Writ of Error.....	125

Names and Addresses of Attorneys of Record.

Messrs. T. F. McCUE, Esq., Great Falls, Montana,
Attorney for Plaintiff and Plaintiff in Error.

Messrs. GRIMSTAD & BROWN, Billings,
Montana,

J. W. SPEER, Esq., Great Falls, Montana,
Attorneys for Defendant and Defendant in
Error. [1*]

In the District Court of the United States in and
for the District of Montana.

No. 816.

TISDALE I. VAN ATTA,

Plaintiff,

vs.

THE MONTANA NATIONAL BANK,

Defendant.

BE IT REMEMBERED, that on June 24, 1920,
the plaintiff filed his amended complaint herein,
in the words and figures following, to wit: [2]

In the United States District Court, District of the
State of Montana, Great Falls Division.

TISDALE I. VAN ATTA,

Plaintiff,

vs.

THE MONTANA NATIONAL BANK,

Defendant.

*Page-number appearing at foot of page of original certified Transcript
of Record.

Amended Complaint.

The plaintiff for a cause of action against the defendant herein, states:

I.

That the plaintiff is a citizen and a resident of the State of Washington, his place of abode and domicile being in the city of Seattle in such state. That the defendant is a banking corporation, organized and existing under the National Banking Act of the United States, with its principal place of business and domicile located in the city of Billings in the State of Montana.

II.

That on the 27th day of July, 1915, the plaintiff and one W. F. Guy were joint owners and holders, each owning one-half of the following described promissory notes, to wit: One dated June 12th, 1914, due December first, 1914, for \$600.00; one other dated June 12th, 1914, due December first, 1914, for \$300.00; one other dated June 12th, 1914, due October first, 1915, for \$2035.00; one other dated June 12th, 1914, due October first, 1914, for \$2000.00; one other dated June 12th, 1914, due October first, 1922. All of said promissory notes were executed [3] and delivered to plaintiff and the said W. F. Guy by Mike Morley and Louise Morley, the same being secured by certain real estate, described as follows: The south-half of the north-east quarter; the north half of the south half and Lots numbered One, Two, Thrée, Four, Five, Six, Seven, Eight, Nine, Ten, Eleven and Twelve of Sec-

tion numbered Seventeen, and the Northwest quarter of the Northwest quarter and Lots numbered Three, Four and five of Section numbered Twenty, all in Township numbered Six, North of Range numbered Thirty-nine East of the Montana Meridian, situated in Rosebud County, Montana, containing 666.83 acres, as evidenced by a mortgage of the said Morleys of even date with said promissory note, which mortgage was recorded in the office of the County Clerk and Recorder of Rosebud County, Montana, on October 13th, 1914, in book 6 at page 389 thereof. That said promissory notes bore interest at the rate of seven per cent per annum, payable annually.

III.

That on or about the 27th day of July, 1915, the defendant, through its agents and officers, colluded and connived with the said W. F. Guy with the intent and purpose of defrauding the plaintiff out of his right and interest in the notes aforesaid, by which the said W. H. Guy, to secure his individual indebtedness, pledged to defendant said notes, including plaintiff's half thereof. All of which was done without any authority from plaintiff and without his knowledge or consent. That at said time, the defendant, its agents and officers, well knew that plaintiff was the owner of one-half of such notes.

IV.

That at all time mentioned herein, plaintiff was the owner of one-half of such promissory notes and was entitled to the possession thereof; [4] that on the first day of April, 1920, plaintiff demanded

of defendant the possession of one-half of said promissory notes, which demand was refused by defendant and it thereby converted such notes to its own use. That some time prior to such demand defendant, under the aforesaid collusive and pretended agreement with said W. F. Guy, as pledgee, sold such notes and at such pretended sale it bid the same in its own name and claims to own the same, all of which was wrongful and in wanton disregard of plaintiff's rights and without his knowledge.

V.

That at the time of the conversion of said notes by the defendant as aforesaid they were in full force and effect and wholly unpaid. That the value of said notes so converted at the time of such conversion was and is the sum of \$8,150.00, and that plaintiff's interest therein is and was such sum. That by reason of the facts herein alleged the plaintiff has been damaged in the sum of \$8,150, no part of which has been paid.

WHEREFORE, plaintiff demands judgment against the defendant for the sum of \$8,150.00, with interest thereon since the first day of April, 1920, together with his costs and disbursements herein.

T. F. McCUE,
Attorney for Plaintiff.

State of Montana.
Cascade County,—ss.

T. F. McCue, being duly sworn, deposes and says that he is the attorney for the plaintiff in the above-entitled case; that he has prepared the foregoing

complaint and knows the contents thereof, and [5] states upon his best knowledge, information and belief that the allegations and statements are true as set forth therein and that he believes the same to be true; that this verification is made by affiant on behalf of the plaintiff for the reason that plaintiff is not in this state or present in Cascade county, where this verification is made at the time thereof.

T. F. McCUE.

Subscribed and sworn to by the said T. F. McCue before me this 23d day of June, 1920.

[Seal]

GEORGE M. LAIRD,

Notary Public of the State of Montana, Residing at Great Falls.

My commission expires May 15, 1923.

[Endorsed on the back]: No. 816. Title of Court. Title of Cause. Amended Complaint. Filed June 24th, 1920. C. R. Garlow, Clerk. By H. H. Walker, Deputy Clerk. [6]

Thereafter, on September 20, 1920, answer to amended complaint was filed herein, as follows, to wit:

In the United States District Court, District of the State of Montana, Great Falls Division.

TISDALE I. VAN ATTA,

Plaintiff,

vs.

THE MONTANA NATIONAL BANK,

Defendant.

Answer to Amended Complaint.

Comes now the above-named defendant and for its answer to the amended complaint on file herein, admits denies and alleges as follows, to wit:

I.

Admits the allegations contained in paragraph I of said amended complaint and denies, generally, each and every allegation in said amended complaint not hereinafter admitted or qualified.

For a further defense, the defendant alleges:

I.

That the plaintiff and one W. F. Guy, mentioned in plaintiff's complaint, in paragraph two thereof, were at all times mentioned in said complaint, and particularly on the 27th day of July, 1915, co-partners, and as such were doing business under the firm name and style of Guy & Van Atta; that the said plaintiff did not at any time own the said notes described in paragraph two of said defendant's answer; that said notes were owned by a co-partnership consisting of W. F. [7] Guy and Tisdale I. Van Atta, the plaintiff herein, and that plaintiff's interest in said notes on the 27th day of July, 1915, and for some time prior thereto, was a partnership interest, and that he had no individual interest in the same; that he and the said W. F. Guy, on the 27th day of July, 1915, and for a period of more than two years prior thereto, held themselves out to the defendant as partners; that the said W. F. Guy is still living, and the defendant therefore alleges the fact to be that the plaintiff is not the real party

in interest and is not entitled to bring the action alleged in said complaint.

For a further defense, defendant alleges:

I.

That at all times hereinafter mentioned the said plaintiff, Tisdale I. Van Atta, and one W. F. Guy were a copartnership and as such were doing business under the firm name and style of Guy & Van Atta; that said partnership became, on or about the first day of December, 1914, and so far as this answering defendant knows, that said partnership is still in existence and that the same has never been dissolved, and that the said W. F. Guy is still living.

II.

That on or about the first day of December, 1914, the said W. F. Guy and the plaintiff herein, as partners, were indebted to the First National Bank, a banking corporation of Forsyth, Montana, in the sum of about Forty-five Hundred Dollars (\$4500.00); that as security for the said sum the said W. F. Guy and the plaintiff herein pledged to said First National Bank of Forsyth, Montana, the notes described in paragraph two of plaintiff's complaint; that said indebtedness due from the said plaintiff and the said W. F. Guy to the First National Bank of Forsyth, Montana, became due on or about March 1, 1915, that the said First National Bank of Forsyth, Montana, at the time said indebtedness [8] became due to said bank, thereupon caused the said notes described in paragraph two of plaintiff's complaint and which were pledged by the plaintiff and one W. F. Guy to the

said First National Bank of Forsyth, Montana, as hereinbefore set forth, to be sold by virtue of its collateral agreement with the said plaintiff and the said plaintiff and the said W. F. Guy, and that on the 27th day of July, 1915, the Bank of Montana, a banking corporation, organized and existing by virtue of the banking laws of the State of Montana, with its principal place of business at Billings, Montana, purchased the notes described in paragraph two of plaintiff's complaint, which were the notes pledged by plaintiff and one W. F. Guy, as hereinbefore set forth, to the said bank at Forsyth, paying for said notes the sum of Four Thousand Five Hundred Thirty-six and 65/100 Dollars (\$4,536.65), and that said First National Bank of Forsyth thereupon delivered to the Bank of Montana a bill of sale, which bill of sale is hereunto annexed, marked Exhibit "A," and made a part hereof; that said sale of said notes to the Bank of Montana by the First National Bank of Forsyth was made by virtue of a collateral pledge agreement given by the said W. F. Guy and the plaintiff herein to the said Bank at Forsyth, which collateral pledge agreement, among other things, provided as follows:

"I, or we, have transferred and delivered to First National Bank of Forsyth, as collateral security for the payment of this and any other liabilities of the undersigned to the said bank, due or to become due, or that may hereafter be contracted, the following property, value of which is \$———viz: and the undersigned here-

by gives the payee and its assigns authority to sell said property, or any part thereof, or any substitutes thereof, and all additions thereto, on the maturity of the above note, or any time thereafter, or before, in the event of the said security depreciating in value, at any public or private sale, without advertising the same, or demanding payment, or giving notice, with the right to said bank and its assigns themselves to be the purchasers, and after deducting all costs and expenses to apply the residue to the payment of any, either, or all liabilities, as aforesaid, as said payee, or its president, cashier, or assigns, may elect, returning the overplus to the undersigned, and in [9] case the proceeds of the sale of said property shall not cover the principal, interest, and expenses, the undersigned engages to pay the deficiency forthwith, after such sale, with legal interest.

Dated June 22, 1914.

GUY & VAN ATTA.

By Dr. GUY.

At the time of said sale, to wit, on the 27th day of July, 1915, the said plaintiff and W. F. Guy were indebted to the First National Bank of Forsyth in the sum of Four Thousand Five Hundred Thirty-six and 65/100 Dollars (\$4,536.65), and that said sum had been past due since about March 1, 1915; that demand for payment had been made, but that the said plaintiff and the said W. F. Guy, or either of them, refused to pay the same, and that the said

Bank at Forsyth thereupon sold said notes to the said Bank of Montana, who thereupon became the owner thereof in its own right; that said sale was made in good faith and in accordance with the terms of said collateral pledge agreement.

III.

That on June 6, 1914, the plaintiff herein made and executed his certain promissory note to the Bank of Montana, a corporation organized and existing under and by virtue of the laws of the State of Montana, which note was in words and figures as follows:

Billings, Montana, June 6, 1914.

No. 1638.

December 1, 1914, after date, for value received we jointly and severally promise to pay to the order of THE BANK OF MONTANA, [10] BILLINGS, MONTANA, One Thousand Dollars (\$1,000.00), at the Bank of Montana, Billings, Montana, with interest at 8 per cent per annum, payable semi-annually until due, and twelve per cent thereafter, and with all costs of collection, including attorney's fees, if not paid at maturity. Each of the makers hereof and the endorsers hereon, waive demand, protest, and notice of nonpayment.

P. O. Address.

T. I. VAN ATTA.

That on June 27, 1914, the said plaintiff herein, acting for and on behalf of the said W. F. Guy and the plaintiff, who were at that time a copartnership, made, executed and delivered to the Bank of Montana a certain promissory note in words and figures as follows, to wit:

Billings, Montana, June 27, 1914.

No. 1699.

30 days after date, for value received, we jointly and severally promise to pay to the order of THE BANK OF MONTANA, BILLINGS, MONTANA, Fifteen Hundred Dollars (\$1500.00), at the Bank of Montana, Billings, Montana, with interest at 8 per cent per annum, payable semi-annually until due and twelve per cent thereafter; and with all costs of collection, including Attorney's fee, if not paid at maturity. Each of the makers hereof and the endorsers hereon, waive demand, protest, and notice of nonpayment.

GUY & VAN ATTA.

T. I. VAN ATTA.

That on September 28, 1914, the plaintiff herein made, executed and delivered his certain promissory note to the Bank of Montana, which note is in words and figures as follows, to wit:

Billings, Mont., Sept. 28, 1914.

No. 2096.

30 days after date, for value received, we jointly and severally promise to pay to the order of THE BANK OF MONTANA, BILLINGS, MONTANA, Six Hundred Fifty Dollars (\$650.00), at the Bank of Montana, Billings, Montana, with interest at 10 per cent, per annum, payable semi-annually [11] until due, and twelve per cent thereafter; and with all costs of collection, including attorney's fees, if not paid at maturity. Each of the makers hereof

and the endorsers hereon waive demand, protest and notice of nonpayment.

P. O. Address.

T. I. VAN ATTA.

that said first note hereinbefore mentioned matured on December 1, 1914, and that the second note hereinbefore mentioned matured on the 27th day of July, 1914, and that the third note just hereinbefore mentioned matured on the 28th day of October, 1914; that the said Bank of Montana, at various times after said notes became due, demanded payment of said notes, but that the plaintiff herein refused to pay the same, and that the said W. F. Guy refused to pay the same.

IV.

On July 27, 1915, the said plaintiff herein was indebted to the Bank of Montana in the sum of Six Hundred Fifty Dollars (\$650.00), represented by the note dated September 28, 1914, hereinbefore mentioned, together with interest on said note from September 28, 1914, and was likewise indebted to the Bank of Montana in the sum of One Thousand Dollars (\$1,000.00), represented by the promissory note hereinbefore mentioned dated June 6, 1914, together with interest on said sum, and that said plaintiff, together with the said W. F. Guy, was likewise indebted to the said Bank of Montana on said date in the sum of Fifteen Hundred Dollars (\$1500.00), together with interest on said sum, which sum was represented by the promissory note hereinbefore mentioned dated June 27, 1914; that the said Bank had made frequent demands for the payment of all of said indebtedness. [12]

V.

That at that time and for some considerable time before that the said W. F. Guy was interested in the said notes described in paragraph two of plaintiff's complaint; that he was informed that his interest in said notes had been sold under the collateral pledge agreement hereinbefore mentioned; that the plaintiff Tisdale I. Van Atta was likewise informed that his interest in said notes had been sold by the said bank at Forsyth, under the collateral pledge agreement hereinbefore mentioned; that the said W. F. Guy was at that time, and for some considerable time prior thereto, making every effort to obtain a settlement with the said plaintiff in reference to their partnership, and particularly the partnership transaction involving said notes mentioned in paragraph two of plaintiff's complaint, and also a certain contract for deed involving certain city property located in the city of Great Falls, Montana.

VI.

That the Bank of Montana, on or about the 5th day of January, 1915, brought an action in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, against William F. Guy and T. I. Van Atta, who is the plaintiff mentioned in this complaint, which action was for the purpose of enforcing the collection of the said promissory note hereinbefore mentioned, which note was for the sum of Fifteen Hundred Dollars (\$1500.00) and was dated June 27, 1914; that said Bank of Montana, on or about the 5th day of January, 1915, brought an action in the Eighth Judicial

District of the State of Montana, in and for the County of Cascade, against T. I. Van Atta, which action was for the purpose of enforcing the payment of the two promissory notes hereinbefore mentioned, one in the sum of Six Hundred Fifty Dollars (\$650.00) and the other in the sum of One Thousand Dollars (\$1,000.00); that the said defendant in said action, or either of them, did not pay [13] the same and refused at all times to pay the same, and that finally, on or about July 27, 1915, the said W. F. Guy gave his certain promissory note to the said Bank of Montana, which note is in words and figures as follows, to wit:

Billings, Montana, July 27, 1915.

No. 3741.

June 1, 1916, after date, for value received, we jointly and severally promise to pay to the order of THE BANK OF MONTANA, BILLINGS, MONTANA, Eighty-two Hundred Twenty-one and 36/100 (\$8,221.36), at the Bank of Montana, Billings, Montana, with interest at 8 per cent per annum, payable semi-annually until due and twelve per cent thereafter; and with all costs of collection, including attorney's fees, if not paid at maturity. Each of the makers hereof and the endorsers hereon, waive demand, protest, and notice of nonpayment.

W. F. GUY.

P. O. Address:

Great Falls, Mont.

1st Nat. Bk. Bldg.

Secured by collateral.

—that said note was given for the purpose of pay-

ing to the said Bank of Montana the money it had paid to the First National Bank of Forsyth, on the sale of the said notes hereinbefore mentioned, and was likewise given for the purpose of paying to the said Bank of Montana the three notes hereinbefore mentioned, made, executed and delivered to the said Bank of Montana, one in the sum of One Thousand Dollars (\$1,000.00), and one in the sum of Six Hundred Fifty Dollars (\$650.00), and one in the sum of Fifteen Hundred Dollars (\$1500.00), together with interest on said notes, together with the costs incurred by the said Bank of Montana in bringing the action to enforce payment of said notes, as hereinbefore set forth; that all of said sums, together with interest and costs, etc., amounted to the sum of Eighty-two Hundred Twenty-one and 61/100 Dollars (\$8,221.61), set forth in the said note signed by W. F. Guy. [14]

VI.

That at the same time, to wit, on the said 27th day of July, 1915, the said Bank of Montana, in consideration for the signing, execution and delivery of said note, the said W. F. Guy became the owner of said notes described in paragraph two of plaintiff's amended complaint, subject, nevertheless, to the right of the said Bank of Montana to hold said notes until the said W. F. Guy satisfied in full the note signed by him on said date, and that said W. F. Guy thereupon gave to the said Bank of Montana a certain collateral pledge agreement, which collateral pledge agreement is hereby annexed, marked Exhibit "B," and made a part hereof.

VIII.

That said W. F. Guy did not, at the maturity of said note, pay the same to the Bank of Montana, although demand for payment of same was frequently made, and that thereupon the said Bank of Montana, on or about the 23d day of January, 1917, sold said notes so pledged to it by the said W. F. Guy under the collateral pledge agreement hereunto annexed and marked Exhibit "B," and that at said sale the said Bank of Montana became the purchaser, and that the same was in all respects fair and legal and was made in accordance with the terms of said agreement; that notice of said sale was given to the said W. F. Guy by the said bank, and that thereupon the said Bank of Montana became the owner of said notes described in paragraph two of said plaintiff's amended complaint.

IX.

That said notes described in paragraph two of said plaintiff's amended complaint were secured by a mortgage on certain real estate located in the county of Rosebud, State of Montana, and that a copy of said mortgage is hereto annexed and made a part of this answer and marked Exhibit "C"; that said mortgage was a second mortgage, there being a first mortgage on said premises given by Tisdale [15] I. Van Atta, the plaintiff herein, and his wife, and W. F. Guy and his wife to one Abolone Larson, which mortgage was in the sum of Ten Thousand Dollars (\$10,000.00); that at the time said notes so described in paragraph two of plaintiff's amended complaint were delivered to

the said Bank of Montana by the said First National Bank of Forsyth, the said interest on the said first mortgage hereinbefore described had not been paid by the said Mike Morley or Louise Morley, or either of them, and that the taxes on said premises described in said mortgage had not been paid; that said property at that time was not worth more than Fifteen Thousand Dollars (\$15,000.00.).

X.

That at a later date the said Mike Morley and Louise Morley defaulted in the payment of the interest on said first mortgage hereinbefore mentioned, and that the holder of the said mortgage, Abolone Larson thereupon commenced an action in the District Court in and for the county of Rosebud, State of Montana, foreclosing said mortgage, and that the said Mike Morley and Louise Morley and the said plaintiff herein, together with his wife, and the said W. F. Guy, together with his wife, were made party defendants in said action; that said mortgage was foreclosed in the regular way, according to the laws of the State of Montana, and that the property was bid in by the Montana National Bank, a banking corporation, the defendant herein, and that the said defendant thereupon became the owner of said premises subject to the right of redemption on the part of the parties entitled to redeem from said sale; that said sale was made to the defendant herein on the 29th day of September, 1917, and was in all respects fair and legal; that the plaintiff made no effort whatever to redeem from said sale and at the end of the time for

the right of redemption the said plaintiff lost his [16] right in said property, if he had any; that at said sale the defendant herein paid the sum of Twelve Thousand Fourteen and 03/100 Dollars (\$12,014.03), and also paid about the sum of Four Thousand Dollars (\$4,000.00), the same being for delinquent taxes and water assessments on said property described in said mortgage; that on the foreclosure of said property, and after the period of redemption had expired, the second mortgage securing the said notes described in paragraph two of plaintiff's amended complaint became of no value.

XI.

That the plaintiff herein has had ample opportunity since the 27th day of July, 1915, to pay to the said Bank of Montana what he owed the bank and receive from the bank the said notes which the said plaintiff claims to have had an interest in, but that the said plaintiff sat by and refused to do anything towards protecting his interest, if he had any, and that because of his laches he should now be estopped from asserting any claim in and to said notes by reason of any title he may have had in them before the 27th day of July, 1915.

For a further defense and by way of new matter, defendant alleges:

I.

That the plaintiff herein is and was indebted to the defendant herein, at all times hereinafter mentioned, in the sum of Three Thousand One Hundred Fifty Dollars (\$3,150.00), together with ac-

crued interest and costs represented by three certain promissory notes made, executed and delivered by the plaintiff in June and September, 1914; that said notes have not been paid by the plaintiff herein and that he still owes them, and that demand for the payment of same has been made at various times; that plaintiff herein has not paid to this defendant the said sum of Four Thousand Five Hundred Thirty-six and 65/100 Dollars (\$4,536.65), paid by the Bank of Montana to the First National Bank of Forsyth, Montana, on the 27th day of [17] July, 1915, said sum being paid to said bank for the notes described in paragraph two of plaintiff's amended complaint; that the plaintiff herein did not, before the commencement of this action, tender to the defendant herein the amount due and owing defendant from plaintiff.

For a further defense and by way of new matter, defendant alleges:

I.

That the said Mike Morley and Louise Morley, the makers of the notes described in paragraph two of plaintiff's amended complaint, were on July 25, 1915, and for some time prior thereto, and all the time subsequent thereto, absolutely insolvent and unable to pay any of their debts, and that by reason thereof the said notes described in plaintiff's amended complaint are and were absolutely worthless and of no value whatsoever; that the said Louise Morley had no property, and that the said Mike Morley, at the time of his death, on or about March 1, 1920, had no property of any kind whatsoever,

and that the said Louise Morley was unable to pay his funeral expenses, and that she was obliged to rely on her friends and relatives to pay the same.

For a further defense and by way of new matter, defendant alleges:

I.

That the cause of action in the complaint of plaintiff herein is barred by the provisions of the third subdivision of Section 6447 of the Revised Codes of the State of Montana, 1907, for the reason that the said cause of action stated in the complaint has not commenced within three years after the same accrued, if plaintiff had any action. [18]

Further answering, defendant denies that the plaintiff at the time of the alleged conversion set forth in the amended complaint, or at any other time, was the owner of the promissory notes, or any of them, mentioned in paragraph two of said amended complaint, and denies that the plaintiff is entitled to the possession of said notes, or either of them, and denies that the defendant, at or about the time alleged in the complaint, or at any other time, converted said notes, or any of them, to its own use or benefit, and denies that it has since continued to convert said notes to its own use and benefit, and denies that plaintiff has been damaged in the sum of Eight Thousand One Hundred Fifty Dollars (\$8,150.00), or in any sum whatsoever, and denies that said notes at the time of said alleged conversion were worth the sum of Eight Thousand One Hundred Fifty Dollars (\$8,150.00), and in this

behalf alleges that the said notes were absolutely worthless.

Denies that on July 27, 1915, or at any other time, that this *this* defendant, through its agents and officers, colluded and connived, or in any other manner negotiated with one W. F. Guy with the intent or purpose of defrauding the said plaintiff out of any right or interest he may have had at that time in said notes mentioned in paragraph two of plaintiff's amended complaint, and denies that defendant at any time negotiated with the said W. F. Guy except as hereinbefore set forth.

WHEREFORE, defendant prays judgment, that plaintiff take nothing, and that defendant do have and recover its costs in this action herein expended.

[Seal]

GRIMSTAD & BROWN,

By O. KING GRIMSTAD. [19]

State of Montana,

County of Yellowstone,—ss.

N. A. Telyea, being first duly sworn, deposes and says:

That he is one of the officers of the above-named defendant, the Montana National Bank, a corporation, to wit, cashier, and as such makes this affidavit of verification; that he has read the foregoing answer, knows the contents thereof, and that the matters and things therein stated are true to the best of his knowledge, information and belief.

N. A. TELYEA.

Subscribed and sworn to before me this 18th day of September, 1920.

[Seal]

O. KING GRIMSTAD,
Notary Public for the State of Montana, Residing
at Billings, Montana.

My commission expires Jan. 12, 1923. [20]

Exhibit "A."

BILL OF SALE.

KNOW ALL MEN BY THESE PRESENTS:

That the First National Bank of Forsyth, the party of the first part, for and in consideration of the sum of Forty-five Hundred Thirty-six and 65/100 Dollars, lawful money of the United States of America to them in hand paid by Bank of Montana of Billings, Montana, the party of the second part, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell and convey unto the party of the second part, their agent executors, administrators, and assigns,

Five notes dated June 12th, 1914, in favor of Guy and Van Atta and signed by Mike Morley and Louise Morley amounting to \$11,535.00 with interest applied on one note amounting to \$642.50, said notes being sold to the party of the second part by virtue of collateral note against Guy and Van Atta held by said parties of the first part.

TO HAVE AND TO HOLD the same, to the said party of the second part, their executors, administrators and assigns, **FOREVER**; and do, for their heirs, executors and administrators, covenant and agree to and with the said party of the second part,

their executors, administrators and assigns, to warrant and defend the sale of the said property, goods and chattels hereby made, unto the said party of the second part, their executors, administrators and assigns, against all and every person and persons whomsoever, lawfully claiming or to claim the same.

IN WITNESS WHEREOF, we have hereunto set our hands and seals the 27th day of July, in the year of our Lord one thousand nine [21] hundred fifteen.

[Seal]

FIRST NATIONAL BANK OF FORSYTH.

(Seal)

E. F. MEYERHOFF, Cashier. (Seal) [22]

Signed, sealed and delivered in the presence of
ROCKWOOD BROWN.

Exhibit "B."

I have transferred and delivered to THE BANK OF MONTANA, Billings, Montana, as collateral security for the payment of any and all liabilities of the undersigned to said Bank, due or to become due, or that may hereafter be contracted, the following property, in my right and title, value of which is Eleven Thousand Five Hundred Thirty-five & no/100 Dollars, viz.:

Makers.	Date.	Due.	Amount.
Note of Mike Morley and Louise Morley	June 12, 1914,	December 1, 1914	\$600.00
" " Mike Morley and Louise Morley	June 12, 1914,	December 1, 1914	\$300.00
" " Mike Morley and Louise Morley	June 12, 1914,	October 1, 1915	2035.00
" " Mike Morley and Louise Morley	June 12, 1914,	October 1, 1914	2000.00
Cr. Account pipe for Syphon	12/16/14	\$642.50 applied on	interest
" " Mike Morley and Louise Morley	June 12, 1914,	October 1, 1912	6600.00

And the undersigned hereby gives the said payee and its assigns authority to sell the said property, or any part thereof, or any substitutes, and all additions thereto, on the maturity of any or all my liabilities, or at any time thereafter, or before, in the event of the said securities depreciating in value, at any public or private sale, without advertising the same or demanding payment, or giving notice, with the right to said Bank and its assigns to be the purchasers; and after deducting all costs and expenses, to apply the residue to the payment of any, either or all liabilities as aforesaid, as said payee, or its President, Cashier, or assigns shall elect, returning the overplus to the undersigned; and in case of the sale of said property shall not cover the principal, interest, and expenses, the undersigned engages to pay the said deficiency forthwith after such sale, with legal interest.

Billings, Montana, July 27, 1915.

W. F. GUY. [23]

Exhibit "C."

MORTGAGE.

THIS MORTGAGE, made and entered into this 12th day of June, A. D. 1914, by and between Louise Morley and Mike Morley her husband of Howard, Montana, MORTGAGORS and W. F. Guy and Tisdale I. Van Atta, co-partners under the firm name of Guy and Van Atta, MORTGAGEES,

WITNESSETH: That the said Mortgagors, for and in consideration of the sum of Eleven Thousand Five Hundred Thirty-five and no/100 Dollars (\$11,-535.00) in hand paid by said Mortgagees, the receipt

of which is hereby acknowledged, do hereby mortgage and confirm unto said Mortgagees and successors and assigns, forever, the hereinafter described Real Estate, situate, lying and being in ——— County of Rosebud, and State of Montana.

Northwest Quarter of the Northwest Quarter and Lots numbered Three (3), Four (4), and Five (5), of Section Twenty (20), containing 143.09 acres; also Lot numbered Eight (8) of Section Seventeen (17), containing 6.33 acres; also Lots numbered One (1), Two (2), Three (3), Four (4), Five (5), Six (6), Seven (7), Nine (9), Ten (10), Eleven (11) and Twelve (12) and the South Half of the Northeast Quarter and the North Half of the South Half of Section Seventeen (17) containing 515.40 acres. All lying and being in Township Six (6) North of Range Thirty-nine (39) East of Montana Meridian in Montana, together with all rights to the use of water for irrigating said premises and for domestic use thereon, to which the said mortgages or the said premises hereby conveyed are now or may hereafter become entitled, together with all shares of stocks or shares of water in any ditch or irrigation company, which in any manner entitled said mortgagors to water for irrigating or domestic purposes upon said land. Together with all and singular tenements and hereditaments and appurtenances thereunto belonging or appertaining.

Together with all and singular the tenements, hereditaments, appurtenances, easements, water and all other rights belonging or in [24] anywise apper-

taining thereto, unto the said Mortgagees, and successors and assigns.

The said Mortgagors represent to and covenant with the said Mortgagees and successors and assigns that they will WARRANT and defend said premises against the lawful claims of all persons whomsoever and the said Mortgagor each hereby relinquish all right of dower and all right of Homestead, accruing or to accrue, in and to all of said premises; and the said Mortgagor hereby covenant with the said Mortgagees that they are lawfully "seized" and in possession of said premises and the same is free from all encumbrance excepting a mortgage heretofore given by the mortgagees to John Larsen in the sum of Ten Thousand and no/100 Dollars.

PROVIDED ALWAYS. That these presents are upon the express condition that if said mortgagors their heirs, executors or administrators, shall pay or cause to be paid to the said mortgagees and successors and assigns, the full sum of Eleven Thousand Five Hundred Thirty-five and no/100 Dollars, according to the tenor and effect of five certain promissory note or obligation secured hereby, as follows:

One note for \$2,000.00 dated June 12, 1914, due October 1, 1914;

One note for \$600.00 dated June 12, 1914, due December 1, 1914;

One note for \$300.00 dated June 12, 1914, due December 1, 1914;

One note for \$2,035.00 dated June 12, 1914, due October 1, 1915;

One note for \$6,600.00 dated June 12, 1914, due October 1, 1922, each bearing interest at the rate of 7% per annum from date, interest payable annually at First National Bank at Forsyth, Montana.

Then these presents to be VOID, otherwise to be and remain in full force and effect.

It is agreed that if the Mortgagors or maker or makers of the obligation [25] secured by this indenture shall fail to pay the principal or any interest as the same become due, or any taxes, assessments or insurance as required, or otherwise fail to comply with any one or all of the conditions of this mortgage, then all of said debt secured hereby shall become due and collectible, and all rents and profits of said property shall then immediately accrue to the benefit of said Mortgagees; and this mortgage may be foreclosed for the full amount, together with cost, taxes, insurance, cost of abstract of title, attorney's fees, and any and all other sums advanced or expenses incurred on account of said Mortgagors, for whatsoever purposes, and any and all advances shall draw interest at the rate of ten per cent per annum; and be liens under this indenture.

A release of this mortgage is to be made at the expense of the Mortgagors on full payment of the indebtedness secured hereby.

IN WITNESS WHEREOF, the said Mortgagors have hereunto set their hands and seal the day and year first above written.

LOUISE MORLEY. (Seal)

MIKE MORLEY. (Seal)

Signed sealed and delivered in the presence of

[26]

State of Montana,
County of Rosebud,—ss.

On this 12th day of October, in the year A. D. one thousand nine hundred and fourteen, before me, E. F. Meyerhoof, a notary public in and for the county and state aforesaid, personally appeared Louise Morley and Mike Morley known to me (or proven to me on the oath of ——) to be the persons whose names subscribed to the within instrument, and acknowledged to me that they each of them respectively, executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal, the day and year first above written.

[Seal]

E. F. MEYERHOFF,

Notary Public for the State of Montana, Residing at
Forsyth.

My commission expires August 14th, 1917.

(Endorsed on back:)

No. 13985.

MORTGAGE.

Louise Morley and Mike Morley
to

Guy and Van Atta.

Dated June 12th, 1914.

State of Montana,
County of Rosebud,—ss.

Filed for record the 13 day of Oct., A. D. 1914, at

9 o'clock A. M., and recorded, in Book 6 of Mortgages, Page 389 of the Records of Rosebud County, State of Montana.

R. J. COLE,
Recorder of Deeds.
By J. L. Crawford,
Deputy.

Fees \$1.50.

Return to 1st Natl.

c/o 1st Natl.

[Endorsed on the back]: No. 816. Title of Court and Title of Cause. Answer to Amended Complaint. Filed this 20th day of Sept. 1920. C. R. Garlow, Clerk. [27]

Thereafter, on Sept. 20, 1920, reply to answer was duly filed herein, as follows, to wit:

In the United States District Court, District of the State of Montana, Great Falls Division.

TISDALE I. VAN ATTA,

Plaintiff,

vs.

THE MONTANA NATIONAL BANK,

Defendant.

Reply to Answer.

The plaintiff for his reply to the answer of the defendant herein alleges:

I.

The plaintiff denies each and every allegation, matter and thing in the defendant's first defense, except that W. F. Guy is living, which fact is admitted.

II.

Replying to paragraph II of said answer, the plaintiff denies each and every allegation, matter and thing set forth in said paragraph except that at or about the time alleged that the plaintiff and said W. F. Guy were indebted to the First National Bank of Forsyth, in about the sum set forth in said paragraph. The plaintiff especially denies that said First National Bank of Forsyth sold said collateral under said collateral agreement, and alleges the fact to be: That defendant's predecessor merely took a transfer of the notes and indebtedness referred to and stepped in the shoes of said First National Bank of Forsyth.

Further replying to said paragraph II plaintiff alleges that the defendant and its predecessor have waived the right to plead the allegations set forth in said paragraph upon the ground and for the reason that they have waived such right by at all times recognizing that the collateral referred to in such paragraph was held by it as pledge, and [28] not as an owner under a sale by the First National Bank of Forsyth under its collateral agreement; that on account of dealing with said pledged notes for a long period prior to the 27th day of July, 1915, treating the same as the property of this plaintiff, it is now *a stop* from claiming that at said time it was owner of such pledged notes.

III.

Replying to paragraph III of said answer the plaintiffs admit the execution and delivery of the three (3) notes described therein, but allege the fact

to be that the defendant has no interest in said promissory notes nor did it have any interest at the time of the commencement of this action; that on the contrary on or about the 27th day of July, 1915, the defendant assigned and transferred all of said notes to one W. F. Guy, who has been the owner and holder thereof ever since said date.

IV.

Replying to paragraph IV plaintiffs deny each and every allegation, matter and thing therein contained.

V.

Replying to said paragraph V of said answer, the defendant denies each and every allegation, matter and thing therein set forth, but admits that the said W. F. Guy was the owner of one-half interest in the notes referred to.

VI.

Replying to paragraph VI of said answer plaintiff admits that some sort of an action was brought in the District Court of the 8th Judicial District as set forth in said paragraph IV, but alleges the fact to be: That the same was not brought in good faith; that it was a suit instituted by the plaintiff to assist the said W. F. Guy to deprive plaintiff of his right and interest in and to said property, and it was a part of the scheme and fraud alleged and set forth in plaintiff's [29] complaint by which the defendant attempted to assist the said W. F. Guy and this defendant in defrauding the plaintiff out of his interest in and to the notes described in the plaintiff's complaint. Plaintiff admits the execution and delivery of the note described in said paragraph by the said W. F.

Guy, but alleges the fact to be: That this plaintiff has no interest of any nature or kind therein. The plaintiff denies each and every other allegation set forth in said paragraph except that which is hereinbefore admitted.

VII.

Replying to paragraph VII of said complaint the plaintiff denies each and every allegation, matter and thing herein set forth.

VIII.

Replying to paragraph VIII of said answer plaintiff has no knowledge or information of the facts set forth therein upon which to form a belief, and upon information and belief he denies each and every allegation, matter and thing set forth in said paragraph.

IX.

Replying to paragraph IX of said answer plaintiff admits that the notes described in the complaint and referred to in said paragraph of such answer were secured by a mortgage as alleged. Plaintiff especially denies each and every other allegation set forth in said paragraph and alleges the fact to be: That said land securing said notes was at all times mentioned herein of the reasonable market value of Fifty Thousand (\$50,000.00) Dollars.

X.

Replying to paragraph X of said answer the plaintiff alleges that he has neither knowledge nor information sufficient to form a belief, and upon [30] information and belief the plaintiff denies each and every allegation and thing set forth in said paragraph and says that whatever proceedings were had

were done without any knowledge or actual notice to this plaintiff.

Replying to paragraph 1 of the new matter pleaded in said answer, plaintiff denies each and every allegation, matter and thing therein contained, and alleges the fact to be; That at the time of the commencement of this action the plaintiff was not indebted to the defendant in any sum whatever.

Further replying, the plaintiff denies each and every allegation, matter and thing set out in the entire answer of the defendant herein, except that which has hereinbefore been expressly admitted.

WHEREFORE, the plaintiff prays judgment in accordance with the relief demanded in this complaint.

T. F. McCUE,
Attorney for Plaintiff.

State of Montana,
County of Cascade,—ss.

T. F. McCue, being duly sworn, deposes and says: That he is the attorney for the plaintiff in the above-entitled action; that he has prepared the above and foregoing reply and knows the contents thereof; that affiant has personal knowledge of the matters and things set forth in such reply and that the allegations and statements therein contained are true of his own knowledge, except those allegations stated upon information and belief, and as to such allegations—affiant believes the same to be true.

T. F. McCUE.

Subscribed and sworn to before me by the said
T. F. McCue this 20th day of September, A. D. 1920.

[Seal]

W. A. STEPHENSON,

Notary Public for the State of Montana, Residing at
Great Falls.

My commission expires July 25, 1922.

Filed Sept. 20, 1920. C. R. Garlow, Clerk. [31]

Thereafter, on December 22, 1920, upon the trial of
said cause, a directed verdict for defendant was en-
tered herein, the record of trial and verdict being as
follows, to wit: [32]

In the District Court of the United States for the
District of Montana.

No. 816.

T. I. VAN ATTA,

Plaintiff,

vs.

MONTANA NATIONAL BANK,

Defendant.

Verdict and Record of Trial.

This cause came on regularly for trial this day,
T. F. McCue, Esq., appearing for plaintiff, and O. K.
Grimstad, Esq., appearing for defendant. There-
upon on motion of counsel, the name of J. W. Speer,
Esq., was ordered entered as additional counsel for
defendant. Thereupon Court ordered that the mo-
tion for judgment on the pleadings, heard and sub-

mitted on yesterday, be and is denied, to which ruling of the Court the defendant then and there excepted and exception noted. Thereupon the following were duly impaneled, accepted and sworn as a jury to try the cause, viz. P: W. Bradford, M. M. Connor, H. E. Smith John Moriarity, J. Van Teylingen, Bernard Joyce, M. McAndrews, C. A. Oleson, John D. Ross, J. Ira Jones, H. R. Stevens, W. P. Elwell. Thereupon T. I. Van Atta was called and sworn as a witness for plaintiff, whereupon defendant objected to the introduction of any evidence at this time upon the ground the complaint does not state a cause of action, which objection was overruled and exception of defendant noted. Thereupon the said T. I. Van Atta testified as a witness for the plaintiff and W. F. Guy was sworn and examined as a witness [33] for plaintiff. Thereupon plaintiff asked leave to amend the complaint by interlineation, to which the defendant then and there objected, and after due consideration the Court ordered that the amendment be allowed and that said amendment be prepared in writing and filed in due course. Thereupon plaintiff rested, with the privilege of calling another witness who was not present this day because of the change in the date of trial. Thereupon defendant moved the Court to direct a verdict herein in favor of the defendant and against the plaintiff upon the ground the complaint does not state facts sufficient to constitute a cause of action and for lack of proof, which motion was argued and submitted. Thereupon, after due consideration Court ordered that defendant's said motion be granted and that a verdict in favor of the

defendant and against the plaintiff be and hereby is entered by the clerk, to which ruling of the Court the plaintiff then and there excepted and exception noted. Thereupon on motion of counsel for the plaintiff, the said plaintiff was granted thirty days for a bill of exceptions herein.

Entered in open court this 22d day of December, A. D. 1920.

C. R. GARLOW,
Clerk. [34]

Thereafter, on December 29, 1920, Judgment was duly entered herein, in the words and figures following, to wit: [35]

In the District Court of the United States, District of Montana, Great Falls Division.

No. 816.

T. I. VAN ATTA,

Plaintiff,

vs.

MONTANA NATIONAL BANK,

Defendant.

Judgment.

This action came on regularly for trial on the 22d day of December, 1920, the said parties appearing by their attorneys. A jury of twelve persons was regularly impanelled and sworn to try the said action.

Witnesses on the part of plaintiff were sworn and examined and after plaintiff had introduced all his

evidence and had rested his case, counsel for defendant moved the Court to direct the jury to return a verdict in favor of defendant, which motion was by the Court granted and thereupon the clerk of said Court was instructed by said Court to enter a verdict for the defendant, which the said clerk did thereupon do.

WHEREFORE, by virtue of the law and by reason of the premises aforesaid, it is ORDERED, ADJUDGED AND DECREED that plaintiff take nothing by this action and that defendant have and recover of and from plaintiff his costs and disbursements incurred in this action, amounting to the sum of \$237.09.

Judgment rendered and entered this 29th day of December, A. D. 1920.

[Seal]

C. R. GARLOW,

Clerk of the United States District Court. [36]

Thereafter, on Jan. 14, 1921, petition for new trial was filed herein, in the words and figures following, to wit:

In the District Court of the United States for the
District of Montana.

TISDALE I. VAN ATTA,

Plaintiff,

vs.

THE MONTANA NATIONAL BANK,

Defendant.

Petition for New Trial.

Now comes the plaintiff in the above-entitled case, through his attorney, T. F. McCue, and petitions this Honorable Court to set aside the judgment rendered in this case and grant a new trial herein.

That this petition is based upon the bill of exceptions settled and allowed herein, also upon the assignment of error filed herewith. Said petition is also further based upon the pleadings and files in this case, all of which is respectfully submitted.

Dated this 12th day of January, A. D. 1921.

T. F. McCUE,
Attorney for Plaintiff,
Great Falls, Montana.

State of Montana,
County of Cascade,—ss.

T. F. McCue, being duly sworn, deposes and says: That he is attorney for the plaintiff in the above-entitled action; that he has prepared the foregoing petition for a new trial and knows the contents thereof; that the contents thereof are true. This verification is made on behalf of plaintiff and made by affiant for the reason that the plaintiff is not present in Cascade County, where this verification is made, at the time of the making thereof. [37]

Dated this 12th day of January, A. D. 1921.

T. F. McCUE.

Subscribed and sworn to by the said T. F. McCue on this 12th day of January, A. D. 1921.

[Seal] W. A. STEPHENSON,
Notary Public for the State of Montana Residing at
Great Falls.

My commission expires July 25, 1922.

Service of the foregoing petition for new trial is hereby admitted and copy of the same received this 13th day of January, 1921.

GRIMSTAD & BROWN and
J. W. SPEER,

Attorneys for Defendant.

[Indorsed on the back]: No. 816. Title of Court.
Title of Cause. Petition for New Trial. Filed Jan.
14, 1921. C. R. Garlow, Clerk. [38]

Thereafter, on Feb. 17, 1921, decision of Court denying new trial was filed herein, as follows, to wit:

United States District Court, Montana.

VAN ATTA

vs.

MONTANA NAT. BANK.

Decision Denying Motion for New Trial.

The motion of plaintiff for a new trial is denied.

It is useless to again point out the law in reference to the facts of the case. There seems nothing to the latter as here presented, save an obsession on the part of plaintiff that by some strategical twist or quirk in the law he can gain possession of former partnership property without payment of partnership and his personal debts for which the property was pledged.

BOURQUIN,

J.

Feb. 17, 1921.

[Indorsed on the back]: No. 816. Title of Court. Title of Cause. Decision—Motion New Trial Denied. Filed Feb. 17, 1921. C. R. Garlow, Clerk. By H. H. Walker, Deputy. [39]

On January 22, 1921, plaintiff's bill of exceptions was duly settled and allowed, and filed herein, being in the words and figures following, to wit: [40]

In the District Court of the United States for the
District of Montana.

TISDALE I. VAN ATTA,

Plaintiff,

vs.

THE MONTANA NATIONAL BANK,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED, That the above-entitled case came on for trial in the above-named court at the regular term thereof upon the 22d day of December, 1920, before the Hon. GEO. M. BOURQUIN, District Judge, and a jury duly impaneled to try the case. T. F. McCue appeared as counsel for the plaintiff, and Grimstad and Brown and J. W. Speer appeared as counsel for the defendant. Whereupon the following testimony was introduced and proceedings had as follows:

Testimony of Tisdale I. Van Atta, in His Own Behalf.

TISDALE I. VAN ATTA, called and sworn as a witness in his own behalf.

Direct Examination by Mr. McCUE.

I reside in Seattle, Washington, having lived there about two and a half years, and I now reside in Seattle, and I am a citizen and a resident of the State of Washington; have been such for the last couple of years. I am the plaintiff in this action. In 1914 I was a joint owner with Dr. Guy of certain lands in Rosebud County, and was acquainted with this land. Afterwards we sold it to Mike Morley and took a mortgage from Mr. Morley and his wife. The mortgage secured certain notes which notes were executed by Mike Morley and his wife. I don't think I could give you the exact dates of the notes; think it was June, 1914. The notes were dated June 12, 1914; one was for \$600.00, another for \$300.00, another for \$2,036.00; another for \$2,000.00; and another for \$6,600.00. They are the notes I refer to. I left Montana in July, 1914, which was shortly [41] after the sale of this ranch. I am part owner of these notes. I own an undivided half interest in them.

Mr. GRIMSTAD.—We can't find the notice of the demand. We will admit the service of the notice on the Montana National Bank alleged here by the plaintiff.

Exhibit 2 was offered and admitted in evidence, read to the jury, and is as follows:

Plaintiff's Exhibit No. 2.

March 29, 1920.

To the Montana National Bank, Billings, Montana.

Please take notice that Tisdale I. Van Atta is the owner of an undivided one half interest in and to the following described notes, to wit:

One note for \$600.00 due December 1, 1914; another note for \$300.00 due December 1, 1914; another note for \$2035.00 due October 1, 1915; another note for the sum of \$2000.00 due June 12, 1914; another note for the sum of \$6600.00 due October 1, 1922.

All of said promissory notes being dated on the 12th day of June, 1914, executed and delivered by Mike Morley and Louisa Morley, his wife, to Guy and Van Atta (W. F. Guy and Tisdale I. Van Atta).

On behalf of Mr. Tisdale I. Van Atta and as his attorney, I demand of you that you deliver to me for him, an undivided one half of the above described promissory notes.

Dated this 27th day of March, 1920.

T. F. McCUE.

Original registered and served by mail March 29, 1920.

Exhibit 3 was offered and admitted in evidence, read to the jury and is as follows:

Plaintiff's Exhibit No. 3.

POST OFFICE DEPARTMENT.
Official Business.

Penalty for Private use to avoid
payment of postage, \$300.00.

REGISTERED ARTICLE:
No. 20290.

Postmark of delivering office:
BILLINGS

INSURED PARCEL:
No.

Mar. 31
9 P. M.
1920
Mont.
and date of delivery. [42]

Return to—T. F. McCue.

(Name of Sender)

Street and Number,

or Post Office Box,

Post Office at.....Great Falls
State.....Montana

(Reverse Side:)

RETURN RECEIPT.

Received from the Postmaster the Registered or
Insured Article, the original number of which ap-
pears on the face of this card.

THE MONTANA NATIONAL BANK.

(Signature of name of addressee.)

CLYDE CLARK.

(Signature of addressee's agent.)

Date of delivery 191—.

(Stamped)

BILLINGS, MONT.

March 31,

1920

REG. DIV.

Exhibit 1 was offered in evidence, admitted and read to the jury and was as follows:

Plaintiff's Exhibit No. 1.

GRIMSTAD & BROWN,

Lawyers.

Billings, Montana.

O. KING GRIMSTAD.

ROCKWOOD BROWN.

WILLIAM GALLAGHER.

April

First

Mineteen Twenty.

T. F. McCue,

First National Bank Bldg.,

Great Falls, Mont.

Dear Sir:

Your notice to the Montana National Bank of this city in reference to the Van Atta matter has been handed to us for attention, and in reply permit us to state that Mr. Van Atta may have had some interest in these notes at one time but if he did, his interest therein was foreclosed, as the property was sold under a collateral agreement. We might state, however, that if Mr. Van Atta is still interested in this transaction sufficiently to take care of the loss sustained by the bank that we might still do business with him.

Yours very truly,

GRIMSTAD & BROWN.

By O. KING GRIMSTAD.

OKG:MEF. [43]

(Testimony of Tisdale I. Van Atta.)

Q. Mr. Van Atta, this partnership, or whatever it was that existed prior to the sale of the ranch, you may state whether or not that was dissolved and settled between yourself and Mr. Guy.

Mr. GRIMSTAD.—That is objected to as improper under the pleadings in this case; no allegation to that effect.

The COURT.—No proof of any partnership. The objection sustained.

Exception noted and allowed.

Some time after it was done, I knew of the transaction whereby Dr. Guy gave his note for the sum of \$8,200.00 in payment of the original indebtedness that was owed the bank. I think I met you the fore part of this year in Seattle. I think I knew that the National Bank of Montana sold these notes to Dr. Guy and that he had given his note for them. I knew it, but not at the time it was done. I knew it about the time this suit was commenced. I don't know just the exact date. I never told Dr. Guy to do this, or did I give him any instructions, and I have no knowledge of the transaction before it took place. I am acquainted with the market value in 1917 and 1918 of the ranch securing these notes. I judge it is worth around \$50,000.00.

Mr. GRIMSTAD.—The defendant will admit that there was a water right pertinent to this land; that this water right was pertinent to the land securing the notes in controversy and amounting approximately to one thousand inches. On account of the admission Exhibit 4 is withdrawn.

(Testimony of Tisdale I. Van Atta.)

I am still owner of one-half of these Morley notes. I never received any notice of the sale of these collateral notes, which sale the pleadings show took place on the 23d day of January, 1917. The entire transaction took place while I was out of the State, and I have never received any notice. The first time I learned the bank had sold these notes and foreclosed the mortgage securing the Morley notes, I think was in Seattle when you (Mr. McCue) told [44] me. That was prior to the commencement of this action.

Cross-examination by Mr. GRIMSTAD.

That was the first time that I remember of knowing that Dr. Guy had taken over all of those securities. I do not keep a record of all my letters.

Mr. GRIMSTAD.—Have you the letters that we made a demand on you for, Mr. McCue?

Mr. McCUE.—No, I have not. I have all the letters that I could find involved in this matter I produce. They served a notice on me yesterday at which time my client had left Seattle. I produce, pursuant to your notice, all that I had in my possession, which is a letter written—one written by Mr. Langworthy, as cashier of The Bank of Montana on March 13, 1915, and another one written by the same party on March 27, 1915, and those are the only letters I have, and I produce them pursuant to your notice.

Exhibit 5 contains my signature. This is the letter that I wrote to Mr. Langworthy.

Exhibit 5 is offered in evidence, admitted and read to the jury and is as follows:

Defendant's Exhibit No. 5.

HOTEL COEUR D'ALENE.

Howard and Trent Ave.

SPOKANE, WASH.

“THE HOTEL WITH A PERSONALITY.”

Spokane, Wash., Aug. 27, 1916.

Mr. B. S. Langworthy, Cash'r,

The Bank of Montana,

Billings, Montana.

Dear Mr. Langworthy:

I expect to meet Dr. Guy here next Saturday and I have a plan which, if I am successful in carrying thru, will let us all out on the deal.

In order that I may be fully equipped to cope with the situation, I will ask you to mail me a detailed account of how matters stand there, at your bank, between you and Guy and also between you and Guy & Van Atta, and also between you and myself. As I understand the matter, however, it is all *illuminated* by Guy giving you his note for the whole thing. Is this correct? If so, has he ever paid anything on it? How much is due on the matter at this time? Has Morely ever paid anything? Have you started [45] foreclosure proceedings, and when? How much time does he have to redeem? If you will kindly give me all this information and

(Testimony of Tisdale I. Van Atta.)

as much more as possible, I will appreciate it very much, indeed.

I am,

Yours sincerely,

(Signed) T. I. VAN ATTA.

P. S.—I am enclosing addressed envelope,—Hotel Rosalina, Rosalina, Wash.

Q. Mr. Van Atta, you knew, then, on August 27, 1916, that Dr. Guy had given his note to the Bank of Montana, to take up this indebtedness of yours, did you not?

A. Well, may I see that letter, please?

Q. Yes, sir.

A. Yes, I did, then; I knew that; yes, sir.

Exhibit 6 is offered in evidence, admitted and read to the jury and is as follows:

Defendant's Exhibit No. 6.

HOTEL WASHINGTON ANNEX.

SEATTLE, WASH.

8/17/15.

Grimstad & Brown,

Billings, Montana.

Dear Sirs:

Your favor of the 14th inst. at hand.

This is the first I have heard of the "foreclosure" you mention. Will you kindly advise me as to the *amount* for which the "foreclosure" was made?

Also if you know whether Mr. Morley paid all taxes last year, including the irrigation tax? Also did he pay the interest on the Larson mortgage, which became due Apr. 17, 1915.

(Testimony of Tisdale I. Van Atta.)

Also kindly advise me as to how long a period the summons, in question, has to be advertised. I wish to thank you in advance for all this information and which I trust you may see fit to give me at an early date.

Yours very truly,
(Signed) T. I. VAN ATTA.

P. S.—Will you also kindly advise me as to what has been done with the Guy attachment?

That letter was written to the firm of Grimstad & Brown. I have not the letter with me. [46]

Q. To refresh your memory, Mr. Van Atta, I hand you here Exhibit No. 7, and ask you whether or not that is not a copy of the letter you received about that time.

Mr. McCUE.—We object to that inquiry as to the copy for the reason that the exhibit purports to be secondary evidence and incompetent. We will say to the Court at this time that we had no notice of these letters until day before yesterday, and last night or yesterday, notice was served upon us, and it was utterly impossible for us to get the letters; if they were, they were in existence in Seattle and my client had left Seattle and I knew nothing of them; I couldn't get them here if we had them.

The COURT.—You may inquire. We will see later.

Objection is overruled.

Q. That on August 14, 1915 you received a letter from Grimstad & Brown. Was this a copy?

A. No doubt it was.

(Testimony of Tisdale I. Van Atta.)

Mr. GRIMSTAD.—We made demand on the plaintiff for the production of the original letter of which this is a copy according to the witness on the stand, and inasmuch as the original is not here, we now offer in evidence Exhibit No. 7.

Mr. McCUE.—For the purpose of the record, on the demand I wish to state that the original notice was served upon me as counsel for plaintiff in this action, referring to the particular letter, demanding its production, was last night; that the demand was served too late, and we were unable to produce the letter if we had it; we don't know anything about the letter and can't produce it.

The COURT.—It is admitted as a carbon copy in one aspect it is a duplicate, which the defendant might be justified [47] in believing that—all correspondence—certainly can't be very voluminous—relating to this transaction had been brought to the plaintiff, and there is a principle, sometimes adhered to, that oral evidence is permissible when documents sometimes are without jurisdiction. Under all the circumstances, objection overruled.

Exhibit 7 was offered in evidence, admitted and read to the jury, and is as follows:

Defendant's Exhibit No. 7.

August fourteenth,
Nineteen fifteen.

Mr. T. I. Van Atta,
1107 Lakeside Ave.,
Seattle, Washington.

Dear Sir:

We have your favor of the 11th relative to your indebtedness to the Bank of Montana and Mr. Langworthy has also referred to us your letter to him about the same matter.

In this connection we wish to advise that the Guy and Van Atta interests in the Forsyth notes were foreclosed by the Forsyth Bank some two weeks ago, at which time the writer bid them in for the Bank of Montana, who now owns the same. This action is the direct result of your delay and it does not look now as if you would be able to recover anything at all from your equity.

The matter of giving a new note is at this time immaterial and the writer does not therefore need to discuss the question of interest spoken of in your letter. If there is anything further which you would like to know we will be pleased to give you the information. We have started publication of summons in the cases in which the Great Falls property is held under attachment and you will no doubt receive a copy of the complaint by the time this letter reaches you.

Yours very truly,
GRIMSTAD & BROWN.

By _____

RB-H.

Exhibit 8 is a letter I wrote to B. S. Langworthy on the 11th day of August, 1915.

Exhibit 8 is offered in evidence, admitted and read to the jury and is as follows: [48]

Defendant's Exhibit No. 8.

HOTEL SAVOY.

SEATTLE.

Twelve Stories of Solid Comfort.

(Rubber Stamp:)

Aug. 14, 1915.

8/11/125.

Mr. B. S. Langworthy, Cashr.,

The Bank of Montana,

Billings, M't.

Dear Sir:

I am writing to know of general conditions, and of our interests in particular. I am anxious to know if Morley paid his interest to 1st Nat. of Forsyth, as I presume you know and also if he has good crops. I am anxious to know if prospects are good for him to make his payments so that he will meet *all* obligations this fall.

Also will you kindly let me know what my obligations to you figure up to *to* date and greatly oblige

Yours very truly,

(Signed) TISDALE I. VAN ATTA,

1107 Lakeside Ave.

Exhibit 9 contains my signature; it is a letter written to Grimstad & Brown.

Exhibit No. 9 is offered in evidence, read to the jury, and is as follows:

(Testimony of Tisdale I. Van Atta.)

Defendant's Exhibit No. 9.

HOTEL SAVOY.

SEATTLE.

"Twelve Stories of Solid Comfort."

8/11/15.

Grimstad & Brown, Attys.,

Billings, Montana.

Dear Sirs:

I have delayed answering your kind favor of 6/28/15 as I have been endeavoring to get my affairs with Dr. Guy around in better shape. I note you say that the interest was figured at 12% on the note from maturity, etc. I have a letter from Mr. Langworthy, Cashr. Bank of Montana, to the effect that in consideration of my making the assignment of my interest in ranch notes to secure them, that they would only charge me 8% interest straight thru. I think Mr. Langworthy will remember this and if not he can refer to his letter files. The date of his letter was 3/27/15.

Kindly let me know regarding this at your earliest convenience and oblige

Yours very truly, [49]

T. I. VAN ATTA.

1107 Lakeside Ave.

P. S.—He also stated in one of his letters that, for the same reason, *your* charges in the matter would be very reasonable.

Q. Now, Mr. Van Atta, according to these letters, then, you on or about August, 1916, and also in August, 1915, did know that Dr. Guy had given to

(Testimony of Tisdale I. Van Atta.)

the Bank of Montana his personal note for over \$8,000.00 in payment of your note and his indebtedness to the Bank at that time and had taken over this collateral; isn't that true?

A. When did he give that note, may I ask?

Q. He gave it on July 27, 1915.

A. Well, I don't think my letters here refer to that, do they?

Q. No, but the letters refer, do they not, Mr. Van Atta, to the fact that you did know that a foreclosure had taken place of your interest in the Morley notes. A. Not a foreclosure.

Q. Referring particularly to Exhibit 7, which is dated August 14, 1915, a letter by our firm to yourself in answer to your letter, we make this statement to you: "In this connection we wish to advise that the Guy & Van Atta interests in the Forsyth notes were foreclosed by the Forsyth Bank some two weeks ago, at which time the writer bid them in for the Bank of Montana, who now owns the same."

A. Yes, I knew of that foreclosure. Exhibit No. 10 is a copy of the letter I received in reply to my letter of August 27, 1916.

Exhibit No. 10 is offered in evidence, read to the jury and is as follows:

Defendant's Exhibit No. 10.

August thirty-first,
Nineteen Sixteen.

Mr. T. I. Van Atta,
Rosalina,
Washington.

Dear Sir:

Mr. Langworthy has handed us your letter of August 27th, [50] to answer.

The only answer that we can make as the matter now stands, is that Dr. Guy was indebted to The Bank of Montana for about \$8,000.00 and as security for that Dr. Guy put up with the Bank of Montana, the Morley notes. Dr. Guy failed to pay the note when due and the collateral was then sold and bid in by the Bank, so that, as it now stands, the Bank is the holder of the Morley notes. Of course, if you or Dr. Guy desire to pay off this note the Bank will be glad to surrender to you all the securities.

We are about to start suit for the foreclosure of the first mortgage on the Morley ranch as well as the second mortgage, as Mr. Morley has failed to pay the interest on either of them.

It will take about \$8,000.00 besides some costs to clean the matter up with the Bank of Montana at this time.

Yours very truly,
GRIMSTAD & BROWN,
By_____.

OKG-H.

I must have known in 1916 that the Bank of Mon-

(Testimony of Tisdale I. Van Atta.)

tana had taken Dr. Guy's note for approximately \$8,000.00.

Q. Yes, in your letter of August 27, 1916, you say, "As I understand the matter, however, it is all eliminated by Guy giving you his note for the whole thing." You knew then a considerable time before you saw Mr. McCue in Seattle, or in Washington some place, that your interests in these notes had been foreclosed or sold out under the collateral pledge agreement, did you not?

The COURT.—Sold out under what agreement?

Q. Under the agreement, pledge agreement, with Dr. Guy and also the pledge agreement with the First National Bank of Forsyth.

Mr. McCUE.—At this time we object to this line of evidence as being incompetent, immaterial, and there is no proper evidence going to show that any foreclosure was ever made as outlined in the evidence thus far, and is calling for conclusion, opinion, of the witness on a matter that is not within the issues of this case, and also that the inquiry is not proper cross-examination.

The COURT.—He testified he did not know until he met counsel of plaintiff, and his ownership, that is one of the main issues in the case. The question [51] is proper cross-examination. He may answer.

Overruled.

I did not understand that I had been sold out my interests in those notes that the Forsyth Bank. I supposed that the Bank of Montana just took them over. I am supposed to understand the English

(Testimony of Tisdale I. Van Atta.)

language. I understand what the letter says. I knew that the Bank of Montana had taken the notes from the Bank of Forsyth, but I supposed that the Bank of Montana was looking after my interests as they agreed to do. I expected the Bank of Montana to take over those notes, that is what I thought they had done.

Q. This last exhibit reads as follows: "The only answer that we can make, as the matter now stands, is that Dr. Guy was indebted to the Bank of Montana for about \$8,000.00 and as security for that Dr. Guy put up with the Bank of Montana the Morley notes. Dr. Guy failed to pay the note when due and the collateral was then sold by the Bank, so that, as it now stands, the Bank is the holder of the Morley notes." You know on that date, or a few days after that, that the Bank of Montana had taken over the Morley notes from Dr. Guy, did you not?

Mr. McCUE.—Objected to as argumentative and incompetent and intended to place a construction upon a plain letter.

The COURT.—He can answer if he can; objection overruled. I think he will make more progress if he can rely on the language of the letter.

I understand this letter and think I understand the English language. Prior to 1914 Dr. Guy and myself operated a ranch in Rosebud County, Montana. It was operated by Dr. Guy and myself, and carried on under a partnership agreement at the time we were partners, and carried on a bank account in the partnership name, also borrowed some money in the

(Testimony of Tisdale I. Van Atta.)

name of the partnership. We sold the ranch in 1914 but never settled up our differences.

Q. Never got a settlement? A. No, sir. [52]

The notes in question here were really owned by me and Dr. Guy as partners, resulting from the sale of the ranch. In addition to the notes Dr. Guy and I at one time owned a house in Great Falls. During the latter part of 1914 I owed the Bank of Montana a note for \$1,000.00 and another note for \$650.00. They were my personal notes and I think Dr. Guy and I owed a note for \$1,500.00. The sum total of these notes was about \$3,150.00. In 1914 Dr. Guy and I were indebted to the First National Bank of Forsyth but do not know how this indebtedness was paid. I never received the original note back from the Bank of Forsyth. I knew that the Bank of Montana paid the First National Bank of Forsyth on July 27, 1915. I think I knew that a short time afterwards. I don't recall whether Dr. Guy signed the pledge agreement. We put up the Morley notes as collateral security with the First National Bank of Forsyth. I think I know the signature on Exhibit No. 11 and that it is signed by Dr. Guy. He was my partner at that time.

Exhibit No. 11 is offered in evidence, read to the jury and is as follows:

Defendant's Exhibit No. 11.

We have transferred and delivered to the First National Bank of Forsyth, as collateral security, for the payment of this and of any other liabilities of

the undersigned to said Bank, due or to become due, or that may hereafter be contracted, the following property, value of which is Eleven Thousand Five Hundred Thirty-five Dollars, viz:

Five notes dated June 12th, 1914 in favor of Guy and Van Atta and signed by Mike Morley and Louisa Morley, amounting to Eleven Thousand Five Hundred Thirty-five Dollars.

And the Undersigned hereby give the payee and its assigns, authority to sell the said property, or any part thereof, or any substitutes therefor, and all additions thereto, on the maturity of the above note, or at any time thereafter, or before, in the event of the said securities depreciating in value, at any public or private sale, without advertising the same, or demanding payment or giving notice, with the right to said Bank and its [53] themselves to be the purchasers. And, after deducting all costs and expenses, to apply the residue to the payment of any, either or all liabilities as aforesaid, as said payee, or its President, Cashier, or assigns shall elect, returning the overplus to the undersigned; and in case the proceeds of the sale of said property shall not cover the principal, interest and expenses, the undersigned engages to pay the deficiency forthwith after such sale, with legal interest.

(Signed) GUY and VAN ATTA.

By W. F. GUY.

March 22, 1915.

Exhibit 12 contain my signature. It is the original complaint filed in this case.

Exhibit 12 is offered in evidence, read to the jury and is as follows:

Defendant's Exhibit No. 12.

In the United States District Court, of the State
of Montana.

TISDALE I. VAN ATTA,

Plaintiff,

vs.

THE MONTANA NATIONAL BANK,

Defendant.

COMPLAINT.

The plaintiff for a cause of action against the defendant states:

I.

That the plaintiff is a citizen and resident of the State of Washington with his place of abode and domicile in Seattle in such state. That the defendant is a banking corporation organized and existing under the National Banking Act of the United States with its principal place of business located at Billings in the State of Montana and that the domicile of such defendant is at Billings in the State of Montana.

II.

That on the 27th day of June, 1914 and for some time prior thereto, the plaintiff and one W. F. Guy had the possession of and were joint owners of the following described promissory notes, to wit: one note dated June 12th, 1914 due December 1, 1914 for \$600.00; one other note dated June 12th, 1914 due December 1, 1914 for \$300.00; one note dated June

12th, 1914, due October 1, 1915 for the sum of \$2,035.00; one other note dated June 12, 1914, due October 1, 1914, for \$2,000.00; one other note dated June 13, 1914 due October [54] *due October 1, 1922*, for \$6,600.00, all of said notes being executed and delivered to the above named parties by Mike Morley and Louisa Morley, his wife, which promissory notes were secured upon certain ranch property located in Rosebud County, Montana, as evidenced by a mortgage of even date with said promissory notes which mortgage was filed for record in the office of the county clerk and recorder of Rosebud county at or about the time of the date of said promissory notes and recorded in book six (6) of mortgages at page 389, records in the office of such County Clerk & Recorder.

III.

That on or about the 27th day of June, 1914, the plaintiff and one W. F. Guy deposited the promissory notes described in paragraph two of this complaint, as a pledge with the First National Bank of Forsyth, Montana, to secure two promissory notes executed by the plaintiff and the said Guy to such bank, one of said promissory notes amounting to the sum of \$3,845.00 dated June 22, 1914, and the other promissory note being for the sum of \$250.75.

IV.

That on or about the 2d day of April, 1915, the plaintiff was indebted to the bank of Montana of Billings, Montana, on account of two promissory notes he had executed to such bank, one note for the sum of \$1,000.00 and the other promissory note being for

the sum of \$650.00; that at said time the plaintiff entered into an agreement with the Bank of Montana aforesaid, whereby he pledged his interest in the Morley notes described in paragraph two of this complaint subject to the rights of the First National Bank of Forsyth, Montana, to the Bank of Montana of Billings, Montana; that some time afterwards, the Bank of Montana, of Billings, Montana, purchased from the First National Bank of Forsyth, the two promissory notes described in paragraph three of this complaint and thereby succeeded to all of the rights of the First National Bank of Forsyth, Montana, in and to the pledged promissory notes described in paragraph two of this complaint.

V.

That on or about the 27th day of July, 1915, said Bank of Montana of Billings, Montana, thru its agents and officers, colluded and connived with the said W. F. Guy with the intent and purpose of defrauding this plaintiff out of his rights and interest in and to the pledged property described in paragraph two of the complaint through which collusion and connivance the said Bank of Montana did surrender and deliver to the said W. F. Guy the said promissory notes described in paragraph three of this complaint and also the two promissory notes executed by the plaintiff to the said Bank of Montana, for the sum of \$1,000.00 and \$650.00 respectively and also a certain other note for the sum of \$1,500.00 executed by the firm of Guy & Van Atta to said Bank of Montana, such promissory notes being all of the promissory

notes for which the promissory notes described in paragraph two of this complaint had been pledged and they were at said time all of the promissory notes, the payment of which was secured by the pledge aforesaid; that by reason of the same, the said W. F. Guy became the owner and holder of all of such promissory notes; that at the time of this transaction between the said Bank of Montana and the said W. F. Guy, the said Bank of Montana delivered to the said Guy, all of the promissory notes described in paragraph two of this complaint, which were pledged as aforesaid and at or about said time, said Bank of Montana, accepted in payment for all of the debts and obligations hereinbefore described, the individual note of the said W. F. Guy for the sum of \$8,221.36 and at said time the said W. F. Guy for the purpose of securing the said promissory note of \$8,221.36 re-placed all of the note described in paragraph two of this complaint. [55]

VI.

That at the time of the pledging of said promissory notes, as set forth in paragraph five hereof, the said Bank of Montana had full knowledge and was fully cognizant of the fact that such promissory notes were the joint property of this plaintiff and the said W. F. Guy and that they were partnership property; That said pledge by the said Guy as described in paragraph five hereof was made without any knowledge of plaintiff or without his consent or any authority from him authorizing the said Guy to make such pledge for his individual indebtedness and that

such pledge was made without any authority, notice or knowledge of this plaintiff.

VII.

That during all the time mentioned hereinbefore the Bank of Montana of Billings Montana, was Banking corporation duly existing and incorporated under the laws of this State and that some time prior to the 16th day of January, 1917, it became nationalized and was converted from a State Bank into a National Bank under the name of The Montana National Bank of Billings, Montana.

VIII.

That on or about the 23d day of January, 1917, with the further intent and purpose of defrauding and depriving plaintiff out of his right and interest in and to the property described in paragraph two of this complaint, defendant did make a pretended sale of all of such property to satisfy the individual promissory of the said W. F. Guy for the sum of \$8,221.36 and at such pretended sale the defendant purchased the aforesaid pledged property; that by reason thereof the defendant claimed it owned all of such property, being the promissory notes described in paragraph two of this complaint; that afterwards by reason of such collusion, connivance and fraud perpetrated upon this plaintiff, it foreclosed the mortgage against said Mike Morley and his wife upon the land described in such mortgage and thereby extinguished such notes; that afterwards the defendant obtained a sheriff's deed in such foreclosure and thereby became the owner of said land; that afterwards the defendant manipulated

said land and sold same whereby it realized the whole face value and interest thereon, of the promissory notes described in paragraph two of this complaint.

IX.

That at all times mentioned herein this plaintiff was the owner of an undivided one-half interest in and to the promissory notes described in paragraph two of this complaint and also in the mortgage securing same and that at the times of the transactions hereinbefore described between the said Bank of Montana and the said W. F. Guy the said bank well knew of this plaintiff's ownership thereof and interest in the said promissory notes described in paragraph two of this complaint; that the plaintiff is still the owner of an undivided one half in and to the promissory notes described in paragraph two of this complaint and in the mortgage securing same.

X.

That by reason of the facts hereinbefore alleged and set forth, the defendant has converted to his own use all of the promissory notes described in in paragraph two of the complaint, together with the mortgage securing the same; that the plaintiff is still the owner of an undivided one half interest therein and is the owner of an undivided one-half interest in and to all of the earnings and [56] accretion thereto derived by the defendant from such property; that the value of this plaintiff's interest therein was on the 12th day of June 1914, the sum of \$5,767.50 and that the present value of plaintiff's interest therein is the sum of \$5,767.50 together with

interest thereon at the rate of 7 per cent per annum payable annually from and since the 12th day of June 1914.

XI.

That prior to the commencement of this action the plaintiff duly demanded of the defendant an undivided one-half interest of the property so converted as described in this complaint and that the defendant has refused to deliver the plaintiff his rights and interest in such property.

WHEREFORE the plaintiff demands judgment against defendant for the sum of \$8,150.00 together with his costs and disbursements herein.

Dated this 21st day of February, 1920.

T. F. McCUE,

Attorney for Plaintiff.

Exhibit 12 is duly verified by the plaintiff.

At the time I signed the complaint I understood that the notes in controversy were partnership property; that they belonged to me and Guy as partnership property and they still do belong to me and Guy as partnership property. These Morley notes were secured by a second mortgage on the ranch. I think there was a first mortgage on the ranch for \$10,000.00. I don't know whether Morley paid the interest or not. I do not recall that I knew that the first mortgage had been foreclosed, but of course I knew that it had been taken care of by the Bank as I understood it. I received no notice that the action had been started to foreclose the first mortgage, and I made no inquiry about the foreclosure of the first mortgage. I don't know whether I made an inquiry. I don't re-

(Testimony of Tisdale I. Van Atta.)

call when the first mortgage matured. I do not know whether the period of redemption under the foreclosure of the first mortgage has expired.

Q. Mr. Van Atta, if the first mortgage had been foreclosed and the period of redemption has expired, then the value of your securities securing on the second mortgage aren't worth much, are they?

Mr. McCUE.—Objected to, immaterial, assuming facts not in the record, incompetent, immaterial.

The COURT.—He may answer, overruled. [57]

A. Well, that had been taken care of, as I understand it. I don't know, but I was under the impression that the Bank took it over, took over the mortgage; I don't know how. I refer to the Bank of Montana. I can't recall when I first learned that the Bank of Montana had taken over the property. I don't know when I learned of the foreclosure of the first mortgage.

Q. Did you redeem under the sale of the first mortgage?

Mr. McCUE.—Objected to, incompetent, immaterial and irrelevant; furthermore, there was no obligation in view of the records in this case, the plaintiff's notes having been converted, no obligation for him to redeem.

The COURT.—He may answer.

Exception noted and allowed.

A. No,

Q. You never made any effort to, did you?

Mr. McCUE.—Same objection as above.

The COURT.—Like ruling.

(Testimony of Tisdale I. Van Atta.)

Exception noted and allowed.

A. No, sir.

Q. Did you ever inquire as to what amount it would take to redeem?

Mr. McCUE.—Same objection as last above.

The COURT.—I doubt whether the details are material. He may answer.

Mr. McCUE.—Note an exception.

A. I don't recall.

The COURT.—It goes to the question of diligence, if that becomes material.

Redirect Examination.

(By Mr. McCUE.)

Q. Counsel had you to reply that you knew about the foreclosure that the First National Bank of Forsyth made. What did you mean by "foreclosure"? Did you understand and know any foreclosure had been made by the First National Bank of Forsyth of this [58] matter?

A. I understood, as I stated; I understood that the Bank of Montana had taken over those papers or securities from the First National Bank of Forsyth. Inasmuch as they had— May I say this, your Honor?

The COURT.—Proceed.

A. (Cont'd.) Inasmuch as they had agreed to protect me and take care of my interests—

Mr. GRIMSTAD.—To which we object when the agreement between him and the bank protecting his interests is not in question, nothing in writing shown, and nothing here to indicate that the plain-

(Testimony of Tisdale I. Van Atta.)

tiff is suing for an accountable wrong of any rights he may have had.

The COURT.—Objection will be sustained.

The Great Falls property was settled between Dr. Guy and myself.

Q. Have you got any accounts pending now, any partnership that is, accounts with any bank in the name of the firm, or did you have at the time of the commencement of this action?

Mr. GRIMSTAD.—Objected to as incompetent, irrelevant and immaterial, not proper redirect examination.

The COURT.—Sustained.

Exception noted and allowed.

The property we had in Great Falls was real estate. With the exception of my owning one-half of the notes in controversy, we had no other matters pending with reference to the partnership that existed in 1914 that was unsettled. We had no matters outside of the ranch matter. The only partnership that ever existed between Dr. Guy and myself was in relation to this ranch in Rosebud County, and I said that we owned real estate in Great Falls in partnership, that was property we took as part of the first payment on the ranch. Dr. Guy owned one-half of this property and I owned the other half. The deed ran to us jointly. That was disposed of before the commencement of this suit. [59] The Great Falls property was settled up between Dr. Guy and myself. There was no other

(Testimony of Tisdale I. Van Atta.)

partnership business between Dr. Guy and myself, as I recall. At the time that this suit was commenced, the only thing pending was my claim of one-half of these notes in controversy, and the further fact that I owed Dr. Guy on my individual notes, the Bank of Montana notes. I owed fifteen hundred dollars on these notes individually and not as a partnership, and when I stated that the partnership still owed these notes it was with reference to my understanding of the matter as I now explained.

Testimony of Dr. W. F. Guy, for Plaintiff.

Dr. W. F. GUY, called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. McCUE.)

My name is W. F. Guy. I reside in Great Falls; am a dentist by profession. I am the W. F. Guy who one time was one of the owners of the Morley ranch in Rosebud County, this State, in partnership with Mr. Van Atta. We owned it together. I owned a one-half interest and Mr. Van Atta owned the other half, in common. I was present at the time *that the present at the time that* the notes owned by myself and Van Atta were turned over by the First National Bank of Forsyth to the Bank of Montana. Mr. Brown, of the firm of Grimstad & Brown, and Mr. Meyerhoff of the Bank of Forsyth were also present. During this time I was per-

(Testimony of Dr. W. F. Guy.)

sonally acquainted with Mr. Langworthy, the Cashier of the Bank of Montana. Previous to going down to Forsyth, I had a conversation with Mr. Langworthy, with reference to the Morley notes.

Q. Tell the jury what was said between yourself and Mr. Langworthy.

Mr. GRIMSTAD.—That is objected to, incompetent, irrelevant and immaterial.

The COURT.—What is the object of this?

Mr. McCUE.—The object, if your Honor please, is that in the pleadings and, in a way, in cross-examination [60] it has been claimed by the defendant in this case that there was a sale, a foreclosure in that transaction, and our contention being that the Bank of Montana merely succeeded to the interests of the First National Bank of Forsyth that it did not in fact constitute a foreclosure or an extinction of the title to the collateral security in the plaintiff.

The COURT.—The objection will be sustained.

Exception noted and allowed.

Q. What was done when you got down to the First National Bank of Forsyth by yourself and Mr. Brown, a member of the firm of Grimstad & Brown, representing the Montana National Bank,—Bank of Montana; and the officers of the Bank, and the First National Bank of Forsyth?

Mr. GRIMSTAD.—Objected to as immaterial.

The COURT.—The objection will be sustained, if ever anything of that sort will be material, it is not now.

(Testimony of Dr. W. F. Guy.)

After my return from Forsyth, I went over to the Bank of Montana by prearrangement.

Q. What was done there, if anything, with reference to the notes involved in this lawsuit.

Mr. GRIMSTAD.—That is objected to, incompetent, irrelevant and immaterial.

The COURT.—What is the object of this?

Mr. McCUE.—I want to show the actual transaction that took place, along the line that we contend for in this lawsuit, that the taking over of the notes by this witness and the repledging of them was a transaction without any sale and still preserved the title in the plaintiff to the notes in question.

The COURT.—I find nothing in your complaint. [61] You start off with the fact that these two men owned these notes and that this plaintiff pledged them for his debt.

Mr. McCUE.—That is true; we take it this is a part of the evidence?

The COURT.—Proceed; objection sustained to the last question.

We got back to Billings on the 27th day of July, 1915, about noon. By prearrangement, after these notes came back from Forsyth, I was to meet Mr. Langworthy by agreement and these notes were all to be transferred over to me, along with Mr. Van Atta's personal notes, and also the notes of Guy and Van Atta at the Forsyth Bank, consisting of two notes, and these notes were to be turned over to me, and also the Morley notes were to be turned over to me by the Bank of Forsyth, consisting of two notes.

(Testimony of Dr. W. F. Guy.)

These notes were to be turned over to me, and also the Morley notes were to be endorsed by the Bank of Montana to me as an individual, and for those considerations, the consideration of them giving me full title, signing over to me without recourse these Morley notes, and also the Guy & Van Atta notes, I was to give them my personal note for eight thousand dollars. I executed the note for \$8,000.00 and some hundred dollars, and at this time I received all the notes that were owed individually by the plaintiff in this case. I know where these notes are now. My wife, Mrs. W. F. Guy is the owner and holder of these notes and they are unpaid. The notes were marked for identification, Exhibits 14 to 19, inclusive. I was acquainted with Mr. Langworthy at the time he was cashier of the Bank of Montana, and I am also acquainted with his signature. The signature on Exhibit 19 is Mr. Langworthy's signature. Exhibit 19 was delivered to me on or about the date it bears. Exhibit 14 is signed by Mr. Langworthy. It was also delivered to me at or about the date it bears. [62]

Exhibit 15 also contains Mr. Langworthy's signature and was delivered to me at or about the date it bears.

Exhibits 14, 15 and 19 are offered in evidence.

Mr. GRIMSTAD.—Defendant objects, of course, to the amendment, bringing in an entirely new cause of action which we did not have to provide ourselves against; no allegation in the complaint; the complaint would be against the Montana Na-

(Testimony of Dr. W. F. Guy.)

tional Bank and not against the Bank of Montana. Objected to at this time.

The COURT.—What do you mean by “Successor” again? That is a legal conclusion of some sort; it might mean many different things; a successor is not always responsible for the torts of a predecessor, if that is what your moving alleged.

Mr. McCUE.—I move to amend the complaint to show that the defendant succeeded to all of the rights of the Bank of Montana in these notes and, as a matter of fact, that the defendant later on did sell these notes. It seems to me, if the Court please, that that is only a matter of proof. We alleged that this defendant did convert them and we are going to show that the conversion took place after this transaction by the defendant. It seems to me that it is only just a chain in the matter of proof, to show that they succeeded to the rights of the Bank of Montana, because afterwards the defendant did in fact make the sale that we allege to constitute a conversion in this action.

The COURT.—You are confronted by a pleading that does not bear you out. You have got to plead your case. Now, you say you want to show—succeeded; now what do you mean? Some successors might be liable, others not; it depends entirely upon the nature of the succession. What do you propose to plead?

Mr. McCUE.—I propose to plead that the Bank of Montana was converted in the Bank of Montana—the [63] First National Bank, and that the

(Testimony of Dr. W. F. Guy.)

National Bank of Montana succeeded to the rights of all of the property that was belonging to the Bank of Montana, and that this particular transaction in the pledging, or attempted pledge by the witness Guy was made to the Bank of Montana; that afterwards the Montana National Bank, this defendant, succeeded to all the rights and interests that the Bank of Montana had in these notes; and then the allegation that the National Bank of Montana converted these notes is correct. That is what we propose to show. In other words, all I wish to amend the complaint, instead of alleging that the transaction and the deposit of these Morley notes was made by the defendant, that they were made with the Bank of Montana, and that afterward the First National Bank—or the Bank of Montana was converted into the National Bank, the defendant, and that the defendant succeeded to all the rights in this paper, and ratified the transaction heretofore made and afterwards sold them under the collateral agreement given; and that is the conversion that we rely on. It seems to me it is only a matter of evidence anyhow, leading up to a matter that we can show the conversion.

The COURT.—I am of the opinion that this cannot take the defense by surprise. Unless some showing of that is made to the contrary, the amendment is allowed. You can prepare it in writing in due time. Proceed with your examination.

Mr. McCUE.—That is, the proposed amendment?

The COURT.—Yes. The objection to the offer is overruled.

Exception noted and allowed. [64]

Exhibit 14 is read to the jury and is as follows:

Plaintiff's Exhibit No. 14.

BANK OF MONTANA.

Billings, Mont., July 27, 1915.

RECEIVED OF W. F. Guy note of T. I. Van Atta for \$1000.00 due Dec. 1, 1914. Note of Guy & Van Atta for \$1500.00 due July 27, 1914 and note of T. I. Van Atta for \$650.00 (on which \$6.00 is endorsed) due October 28, 1914.

Said notes have today been paid by W. F. Guy by new note. We hold said notes as long as necessary for the prosecution of a certain suit for the benefit of W. F. Guy against T. I. Van Atta against certain real estate in Great Falls, Montana, now in suit.

B. S. LANGWORTHY,
Cashier.

Exhibit 15 is read to the jury, and is as follows:

Plaintiff's Exhibit No. 15.

It is hereby understood and agreed by and between the BANK OF MONTANA, a corporation of Billings, Montana, and Dr. W. F. Guy, of Great Falls, Montana: That whereas, the Bank of Montana has instituted legal action against one T. I. Van Atta and against Van Atta and W. F. Guy on certain promissory notes, and levied attachment against certain real property belonging to said Van

Atta and Guy; And whereas, said Guy has assumed the entire indebtedness of said Van Atta, individually and said Guy and Van Atta as a partnership and in the assumption of said indebtedness has transferred certain notes signed by Mike and Louise Morley to the Bank of Montana as collateral security:

Now therefore, for and in consideration of the premises, it is understood and agreed that said Bank of Montana will dismiss its action and attachment as to the said Dr. W. F. Guy; that in the event said attached property is sold under execution sale and bid in by said Bank of Montana, the Sheriff's certificate of sale issued thereon will be assigned by said Bank of Montana to said W. F. Guy for his benefit. And the said Guy agrees to pay all court costs accruing from this date which arise from the prosecution of said actions and sale of said property.

In witness whereof the parties to this agreement have hereunto set their hands and seals this 27th day of July, 1915.

THE BANK OF MONTANA.

By B. S. LANGWORTHY,

Cashier.

W. F. GUY.

Exhibit 19 is read to the jury, and is as follows:

Plaintiff's Exhibit No. 19.

THE BANK OF MONTANA.

I have transferred and delivered to The Bank of Montana, Billings, Montana, as collateral security

for the payment of any and all liabilities of the undersigned to said bank due or [65] to become due, or that may hereafter be contracted, the following property, in my right and title, value of which is eleven Thousand, five hundred Thirty-five and no/100 Dollars, viz.:

Makers.	Date.	Due.	Amount.
Note of Mike Morley and Louise Morley	June 12, 1914, Dec. 1, 1914,		\$600.00
Note of Mike Morley and Louise Morley	June 12, 1914, Dec. 1, 1914,		300.00
Note of Mike Morley and Louise Morley	June 12, 1914, Oct. 1, 1915,		2035.00
Note of Mike Morley and Louise Morley	June 12, 1914, Oct. 1, 1914,		2000.00
CR. Account Pipe for Syphon 12/16/14 applied on interest			
Note of Mike Morley and Louise Morley	June 12, 1914, Oct. 1, 1912,		6600.00

Received above described notes as collateral July 27, 1915, said notes having all, previous to this agreement, been endorsed by this bank, without recourse, to W. F. Guy and afterwards endorsed by W. F. Guy to this bank.

(Signed) B. S. LANGWORTHY, Cas.

(Printed portion:) And the undersigned hereby gives the said payee and its assigns authority to sell the said property, or any part thereof, or any substitutes, and all additions thereto, on the maturity of any or all my liabilities, or at any time thereafter, or before, in the event of the said securities depreciating in value, at any public or private sale, without advertisement of the same, or demanding payment, or giving notice, with the right to said Bank and its assigns themselves, to be the purchasers; and after deducting all costs and expenses, to apply the residue to the payment of any, either or all liabilities as aforesaid, as said payee, or its President, Cashier, or assigns shall elect, returning the overplus to the undersigned; and in

case the proceeds of the sale of said property shall not cover the principal, interest and expenses, the undersigned engages to pay the said deficiency forthwith after such sale, with legal interest.

Billings, Montana, July 27, 1915.

Exhibit 20 is the note described in Exhibit 19.

Exhibit 20 is offered in evidence, read to the jury and is as follows:

Plaintiff's Exhibit No. 20.

Billings, Montana, Jul. 27, 1915.

No. 3741.

June 1, 1916, after date, for value received, we jointly and severally promise to pay to the order of THE BANK OF MONTANA, BILLINGS, MONTANA, Eighty-two Hundred Twenty-one and 36/100 Dollars (\$8,221.36), AT THE BANK OF MONTANA, BILLINGS, MONTANA, with interest at 8 per cent per annum, payable semi-annually until due, and twelve per cent thereafter; and with all costs of collection, including attorney's fees, if not paid at maturity. Each of the makers hereof and the endorsers herein, waive demand, protest, and notice of nonpayment.

(Signed) W. F. GUY. [66]

P. P. Address:

Great Falls, Montana.

1st Nat. Bank Bldg.

(Pencil Notation): Int. 2/19/18.

\$2,273.66

Secured by

Collateral. (Blue Pencil Notation): 6

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1—
16

Bearing on the back \$1.66 documentary internal revenue stamps, and endorsed:

“Jan. 23, 1917. Paid \$500.00. (By sale of Collateral).” Which endorsement is cancelled, or at least has a wavy pencil mark drawn thru it.

Also endorsed:

“Without recourse. The Bank of Montana, Billings, Mont. N. A. Telyea, Cashier.

Exhibits 21 and 22 are the individual notes of the plaintiff given by him to The Bank of Montana. Exhibits 21 and 22 are offered in evidence. Exhibit 21 is read to the jury and is as follows:

Plaintiff's Exhibit No. 21.

Billings, Montana, Sept. 28, 1914.

No. 2096.

30 Days after date, for value received, we jointly and severally promise to pay to the order of THE BANK OF MONTANA, BILLINGS, MONTANA, Six Hundred Fifty Dollars (\$650.00), at the BANK OF MONTANA, BILLINGS, MONTANA, with

interest at 10 per cent. per annum, payable semi-annually until due, and twelve per cent thereafter; and with all costs of collection, including ATTORNEY'S FEE'S if not paid at maturity. Each of the makers hereof and the endorsers hereon, waive demand, protest, and notice of nonpayment.

(Signed) T. I. VAN ATTA.

(Black lead pencil notation:) 44.71 (with circle around it).

(Red lead pencil notation:) 10

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28

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14

(Endorsed on back:)

PAYMENTS.

Date of Payment.	Total Paid.	Applied on Interest.	Applied on Principal.	Balance of Principal Unpaid.
10-8-14	6	6	644

(Also endorsed:) "Without recourse,
The Bank of Montana,
Billings, Montana.
N. A. Telyea, Cashier.

(Rubber stamp:) Nov. 13, 1914. Oct. 21, 1914.

Exhibit 22 is read to the jury and is as follows:

Plaintiff's Exhibit No. 22.

Billings, Montana, Jun. 6, 1914.

No. 1638. [67]

December 31, 1914, after date, for value received, we jointly and severally promise to pay to the order of THE BANK OF MONTANA, BILLINGS, MONTANA, with interest at 8 per cent per annum,

payable semi-annually until due, and twelve per cent thereafter, and with all costs of collection, including attorney's fees, if not paid at maturity. Each of the makers hereof and the endorsers hereon waive demand, protest and notice of nonpayment.

(Signed) T. I. VAN ATTA.

P. O. Address:

Howard, Montana.

(Black lead pencil notation:) 0 91.34.

(Red pencil notation:) 12.

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1

—
14

—

(Endorsed on back:) Without Recourse.

The Bank of Montana,
Billings, Montana.

N. A. Telvea, Cashier.

(Black lead pencil notation, written faintly with circle around:) 40.00.

(Rubber stamp notation:) Nov. 28, 1914.

Besides these notes there was one signed by T. I. Van Atta for \$1500.00, signed Guy and Van Atta, by T. I. Van Atta. These notes and also the Morley notes consisting of \$11,500.00 were endorsed to me and given over to me. Also the original Guy and Van Atta notes held by the First National Bank of Forsyth were turned over to me at the time. At the time these notes were turned over to me there was an action pending on Exhibits 21 and 22 in the District Court of Cascade county

against the plaintiff in this case. That case was afterwards disposed of and settled. There was an attachment issued in that suit. The property was owned by Mr. Van Atta and myself. The obligations and debts of Guy and Van Atta have all been settled. I think they were all settled prior to 1917. We had a settlement settling up all our partnership relations in regard to all debts, and things pertaining to the partnership. We had a settlement prior to 1917, I think. It might also have been the fore part of 1917. The Great Falls property was the last piece of property that our partnership owned. Van Atta sold his interest in that property to my wife. That was about 1917 and that wound up everything in connection with the partnership. The T. I. Van Atta notes that I got from the Bank of Montana and also the note of \$1500.00 signed by T. I. Van Atta are still a claim against Mr. Van Atta and they are not paid. All of the rest of the matters of the partnership business has been cleaned up and adjusted. To my [68] knowledge they were all settled. I was a party to the settlement. There are no outstanding partnership obligations or partnership property between myself and Van Atta unless you consider the Morley notes are not settled. I am not claiming any interest in the Morley notes. My interest in the Morley notes was taken over by the bank. I am making no claim whatever as to any interest in these Morley notes. Exhibit 23 contains the signature of B. S. Langworthy, cashier of the National Bank of Montana.

Exhibit 23 is the notice that was served upon me at or about the date it bears.

Exhibit 23 is offered in evidence, read to the jury and is as follows:

Plaintiff's Exhibit No. 23.

To W. F. GUY,

Great Falls, Mont.

WHEREAS, you have defaulted in the payment of both principal and interest on your certain promissory note dated July 27, 1915, in the sum of \$8,221.36, with interest at eight per cent per annum, payable semi-annually until due and due June 1st, 1918, given to Bank of Montana, Billings, Montana and by it endorsed to the Montana National Bank of Billings, Montana, who is now the owner and holder thereof, and

WHEREAS, on the 27th day of July, 1915, as security for the payment of said note you transferred and delivered to the said Bank of Montana at Billings, Montana, the following notes and claims, to wit:

Note signed by Mike Morley and Louise Morley,
Dated June 12, 1914, due Dec. 1st, 1914, in the sum of \$600, with interest at 7%.

Note signed by Mike Morley & Louise Morley, dated June 12, 1914, due Dec. 1st, 1914, in the sum of \$300, with interest at 7%.

Note signed by Mike Morley & Louise Morley, dated June 12, 1914, due October 1st, 1915, in the sum of \$2,035, with interest at 7%.

Note signed by Mike Morley & Louise Morley, dated June 12, 1914, due October 1st, 1914, in the sum of \$2,000.00 with interest at 7%.

Note signed by Mike Morley & Louise Morley, dated June 12, 1914, due Oct. 1st, 1922, in the sum of \$6,600, with interest at 7%.

One claim against the Yellowstone Irrigation District for work, labor, services and materials in the sum of \$642.50, and

WHEREAS, there is due at this date on your said note the sum of \$9,209.91, no part of which has been paid,—

NOW, THEREFORE, you are hereby notified that the above listed property placed by you with the Bank of Montana, Billings, [69] Montana, as security for this indebtedness, and by said Bank of Montana endorsed to the Montana National Bank at Billings, Montana will be sold to the highest bidder for cash at the place of business of the Montana National Bank at Billings, Montana, on the 23d day of January, 1917, at 10 o'clock in the forenoon of said day, and the proceeds derived from the sale of said property placed by you as collateral security as above stated will be applied as follows, to wit:

I—The payment of all costs, expenses and attorney's fees in making said sale.

II—The balance, if any, will be applied on your indebtedness as above stated.

III—The balance, if any, will be paid to you.

The above notes, together with the above described property to be sold, is in the possession of and be-

longs to the undersigned for the purposes above stated.

Signed and dated at Billings, Montana this 16th day of January, 1917.

MONTANA NATIONAL BANK,

By B. S. LANGWORTHY,

Vice-pres.

I think Exhibit 23 is the only notice that was ever served upon me with reference to the Bank of Montana or the National Bank of Montana offering the Morley notes for sale under any collateral agreement. I never inquired whether they sold the notes under this notice. At the time that I deposited the Morley notes to secure my individual note of \$8,000.00, Mr. Van Atta gave me no instructions with reference to it. According to our agreement I was to deposit all of the Morley notes as collateral security against that note of mine for about \$8,000.00. There was nothing said at the time whether I was depositing anything other than my half interest. I simply deposited all the notes. They had been signed over to me previously to that, and I signed the whole business back to the Bank of Montana and put them up as collateral on the note of mine. It consisted of handing over the notes. I made out my note or they had already; they signed these notes over to me and I made out my note and they signed them over to me and I signed them back to them as collateral. I made no bid of any kind on these notes. I was acquainted with the value of the Morley ranch securing these Morley notes. Was acquainted with its value in 1917 and also 1920. I mean the market value of this land.

[70] This ranch is made up of what they call buffalo sod; there is *no or* gumbo or alkali on the place, it consists of 671 acres, deeded acres, and it was considered by everybody as one of the best ranches on the Yellowstone river. It was considered level. There was a ditch leading to it so it could be irrigated. About 600 acres of this land could be irrigated. The land was considered of the value of \$100.00 an acre. I would say that from 1917 to 1920 the market value of this land went around \$100.00 an acre. I think I know of other land in that vicinity being sold, *with* I think Mr. Meyerhoff sold some land. Mr. Meyerhoff owns land joining ours and I understand was holding it for \$100.00 an acre, and, I think, sold some for \$100.00. He may have sold it all for all I know. This was between 1917 and 1920. The plaintiff offers Exhibit 24, being certified copy of certificate of sale foreclosing the Morley mortgage and notes, together with certificate of the Clerk and Recorder of Rosebud county on the bank of it, with the seal of his office in evidence.

Exhibit 24 is read to the jury and is as follows: There was a first mortgage on the land amounting to \$10,000.00.

Plaintiff's Exhibit No. 24.

**SHERIFF'S CERTIFICATE OF SALE ON
FORECLOSURE.**

I, Henry Grierson, Sheriff of the County of Rosebud, do hereby certify that under and by virtue of an order of sale issued out of the District Court of the Fifteenth Judicial District of the State of Mon-

tana, in and for the county of Rosebud, in the action of the Montana National Bank of Billings, a National Banking Corporation vs. Mike Morley and Louise Morley, his wife, a judgment and decree was rendered on the 5th day of March, 1917, and entered on the 9th day of March, 1917, in judgment book No. 11 of the said District Court on page 531, duly attested the 9th day of March, 1917, and to me, as such Sheriff duly directed and delivered, whereby I was commanded to sell the property hereinafter described, according to law, and to apply the proceeds of such sale towards the satisfaction of the judgment in said action amounting to the sum of Fourteen Thousand three Hundred Sixty and 35/100 dollars (\$14,360.35), lawful money of the United States, which includes principal, interest, taxes, attorney fees and costs of suit, I duly levied on, and on the 14th day of April, A. D. 1917, at 2 o'clock P. M. at the Courthouse door, in the City of Forsyth, in the said county of Rosebud, I duly sold at public auction according to law, and after due and legal notice, to the Montana National Bank of Billings, a National Banking corporation, who made the highest and best bid therefor at such sale, for the sum of Fourteen Thousand Six Hundred Twenty-five and 20/100 Dollars (\$14,625.20) lawful money of the United States, which was the *shole* sum paid by it for the real estate in said order of sale, lying and being *dituate* in the said county of Rosebud, State of Montana and described as follows, to wit: [71]

Northwest quarter of the northwest quarter, and lots numbered three (3), four (4) and five (5) of sec-

tion twenty (20) containing 143.09 acres; also lot numbered eight (8) of section seventeen (17) containing 6.33 acres; also Lots numbered One (1) two (2) three (3), four (4), Five (5), Six (6), seven (7), nine (9), ten (10), eleven (11), and twelve (12), and the South half of the northeast quarter and the north half of the south half of section seventeen (17), containing 515.40 acres. All lying and being in township six (6) north of range thirty-nine (39) east, of Montana Meridian in Montana together with all rights to use the water for irrigating said premises and for domestic use thereon, to which said mortgagors or the premises hereby conveyed are now or may hereafter become entitled, together with all shares of stock or shares of water in any ditch or irrigation company, which in any manner entitled said mortgagors to water for irrigating or domestic purposes upon said lands.

Together with all and singular tenements, hereditaments, and appurtenances thereunto belonging or appertaining.

And I do further certify that the said property was sold in one lot or parcel, and that the sum of fourteen thousand six hundred twenty-five and 20/100 Dollars (\$14,625.20) was the highest bid made and the whole price paid therefor, and that the same is subject to redemption in lawful money of the United States pursuant to the statute in such case made and provided.

Given under my hand this 18th day of April, 1917.

H. GRIERSON,
Sheriff.

W. I. CHURCH,
Deputy Sheriff.

[Endorsed]: 27066. Sheriff's Certificate of Sale.
Montana National Bank vs. Mike Morley et ux.
Filed April 18, 1917, at 11:30 A. M. W. E. Clarke,
County Clerk. By M. M. Stevens, Deputy.

Office of the County Clerk and Recorder,
Rosebud County, Montana,
State of Montana,
County of Rosebud,—ss.

I do hereby certify that the annexed is a correct transcript of the original remaining on file or record in my office, together with the endorsements thereon contained.

Witness my hand and official seal Dec. 17, 1920.

WARREN BUTTERFIELD,
County Clerk and Recorder.
By (Signed) H. O. Callaghan,
Deputy.

Exhibit 25 is offered in evidence, read to the jury, and is as follows:

Plaintiff's Exhibit No. 25.

Clerk's File 37147.

SHERIFF'S DEED.

This indenture made the eighth day of May, 1918, by and between Henry Grierson, Sheriff of the County of Rosebud, State of Montana, the party of

the first part, and The Montana National Bank of Billings, a National Banking Corporation of Billings, [72] Montana, the party of the second part, witnesseth:

Whereas, in and by a certain judgment or decree rendered by the District Court of the said county of Rosebud, State of Montana, on the 5th day of March, 1917, and entered on the 9th day of March, 1917, in a certain action then pending in said court wherein the Montana National Bank of Billings, a National Banking corporation was plaintiff, and Mike Morley and Louise Morley, his wife, were defendants, and of which said judgment or decree a certified copy was delivered to said party of the first part as such Sheriff, for execution, it was among other things ordered, adjudged and decreed, that all and singular, the mortgaged premises described in the said complaint in said action, and specifically described in the said judgment or decree, be sold at public auction by the sheriff of the said county of Rosebud in the manner required by law, and according to the course and practice of said court; that such sale be made at public auction at the front door of the Courthouse, in the City of Forsyth, County of Rosebud, State of Montana; that any of the parties to the said action might become the purchasers at such sale, and that said Sheriff execute the usual certificate and deeds to the purchaser or purchasers as required by law;

And Whereas, the said sheriff did, at the hour of two o'clock P. M. on the 14th day of April A. D. 1917, after due public notice had been given, as required by the laws of this state, and the course and

practice of said court, duly sell, at public auction in front of the Courthouse door in the said County of Rosebud, agreeably to the said judgment or decree, and the provisions of law, the premises in the said decree or judgment mentioned, at which sale the premises in said judgment or decree, and hereinafter described were fairly struck off to the said The Montana National Bank of Billings, a National Banking corporation, for the sum of Fourteen Thousand Six Hundred twenty-five and 20/100 (\$14,625.-20) lawful money of the United States, the said The Montana National Bank of Billings, a national banking corporation being the highest bidder, and that being the highest sum bidden for the same.

And Whereas, the said Montana National Bank of Billings, a National Banking Corporation, thereupon paid to the said sheriff the said sum of money so bid by it:

And Whereas, the said Sheriff thereupon made and issued the usual certificate in duplicate of the sale in due form of law and delivered one thereof to the said The Montana National Bank of Billings, and caused the other to be filed in the office of the County Recorder of the said County of Rosebud, Montana.

And Whereas, more than twelve months have elapsed since the date of said sale, and no redemption has been made of the premises so sold as aforesaid, by or on behalf of the said judgment debtor, the said defendants, Mike Morley and Louise Morley, his wife, or either of them, or by, or on behalf of any person claiming any right, title or interest in or to the said described premises.

Now this Indenture Witnesseth, that the said party of the first part, the said Henry Grierson, Sheriff, in order to carry into effect the sale so made by him as aforesaid in pursuance of said judgment or decree, and in conformity to the statute in such case made and provided and also in consideration of the premises and of the said sum of Fourteen Thousand Six Hundred Twenty five and 20/100 Dollars, so bidden and paid to him by the said purchaser the said The Montana National Bank of Billings, a national banking corporation of Billings, Montana, the said party of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, sold and conveyed, and by these presents doth grant, [73] bargain, sell and convey unto the said party of the second part, and to its successors and assigns, forever, all that certain lot, piece or parcel of land, situate, lying and being in the said County of Rosebud, State of Montana, and bounded and particularly described as follows, to wit:

The Northwest quarter of the Northwest quarter, (N.W. $\frac{1}{4}$ N.W. $\frac{1}{4}$) and Lots numbered three (3) Four (4) and five (5) of Section twenty (20) containing 143.09 acres; Also lot numbered eight (8) of Section seventeen (17) containing 6.33 acres; Also lots numbered one (1) two (2), three (3) four (4) five (5) six (6) seven (7) nine (9) ten (10) eleven (11) and twelve (12), and the south half of the northeast quarter (S. $\frac{1}{2}$ NE. $\frac{1}{4}$) and the north half of the south half (N. $\frac{1}{2}$ S. $\frac{1}{2}$) of section seventeen (17), containing 515.40 acres, all being and lying in township six (6) north of range thirty-nine

(39) east of Montana Meridian, in Montana, together with all rights to the use of water, or irrigating said premises, and for domestic use thereon, to which said mortgagors or the said premises hereby conveyed are now or may hereafter become entitled, together with all shares of stock or shares of water in any ditch or irrigation company which in any manner entitled said mortgagors to water for irrigation or domestic purposes upon said lands.

Together with all and singular the tenements, hereditaments, and tenements, thereunto belonging or in anywise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

To have and to hold all and singular the premises above mentioned and described, and hereby conveyed or intended to be, with the appurtenances, unto the said party of the second part its successors and assigns forever.

In witness whereof, the said party of the first part to these presents, Sheriff, as aforesaid hath hereunto set his hand and his seal the day and year first above written.

HENRY GRIERSON, (Seal)

Sheriff of the said County of Rosebud, State of Mont.

Witness of Signature: M. HUNTER.

(\$1.00 I. R. Stamps attached and cancelled.)

State of Montana,
County of Rosebud,—ss.

On this 3d day of May, 1918, before me, T. W. Carolan, a notary public in and for the said county

of Rosebud, personally appeared Henry Grierson, Sheriff of the said county of Rosebud, State of Montana, personally known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he, as such sheriff aforesaid, executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year first above written.

[Seal]

T. W. CAROLAN,

Notary Public for the State of Montana, Residing at
Forsyth.

My commission expires on the 11th day of May,
1919. [74]

Filed May 24, 1918, 9 A. M. Fee \$2.50.

W. E. CLARKE,

Clerk and Recorder.

From Book 17 of Deeds, page 508, of the Records
of Rosebud County, Montana.

[Indorsed]:

Office of the County Clerk and Recorder,
Rosebud County, Montana,
State of Montana,
County of Rosebud,—ss.

I do hereby certify that the annexed is a correct transcript of the original remaining on file or record in my office, together with the endorsements thereon contained.

(Testimony of Dr. W. F. Guy.)

Witness my hand and official,

[Seal]

WARREN BUTTERFIELD,

County Clerk and Recorder.

H. O. Callaghan,

Deputy.

December 17, 1920.

Cross-examination.

(By Mr. GRIMSTAD.)

I say there was a first mortgage of 10,000.00 against the land. I believe it was foreclosed, as a matter of fact, I know it was foreclosed. I was made a party to the foreclosure of the first mortgage and served with summons. I did not redeem from the sale. I think the foreclosure of the first mortgage was made at the time that the second mortgage was foreclosed. I was lead to believe that the Montana National Bank bid in the land. The \$8,221.36 note included the notes that were taken over by The Bank of Montana from the First National Bank of Forsyth, amounting to about \$4500.00, including interest, signed by T. I. Van Atta and Guy and Van Atta. That \$8,221.36 practically constituted what Van Atta or Guy and Van Atta owed to the Bank at the time; that is, the indebtedness the Bank of Montana held at that time. On that date I gave the Bank of Montana a collateral pledge, pledging the Morley notes, that is, I gave them a note which I believed was a collateral pledge agreement. Exhibit 26 contains my signature and is the paper that was given to the Bank of Montana on the 27th day of July, 1915. [75]

Exhibit 26 is offered in evidence, read to the jury, and is as follows:

Defendant's Exhibit No. 26.

THE BANK OF MONTANA.

I have transferred and delivered to THE BANK OF MONTANA, Billings, Montana, as collateral security for the payment of any and all liabilities of the undersigned to said Bank, due or to become due, or that may hereafter be contracted, the following property, in my right and title, value of which is Eleven Thousand, Five Hundred, thirty-five and no/100 Dollars, viz:

Makers.					Date.		Due.	Amount.
Mike	Morley	and	Louise	Morley	June	12, 1914,	Dec. 1, 1914,	600.00
"	"	"	"	"	"	"	"	300.00
"	"	"	"	"	"	"	Oct. 1, 1914,	2035.00
"	"	"	"	"	"	"	" 1915,	2000.00

Cr. Account Pipe for Syphon 12/16/14 \$642.50 applied on interest.

Mike Morley and Louise Morley June 12, 1914 Oct. 1, 1922, 6600.00

And the undersigned hereby gives the said payee and its assigns authority to sell said property, or any part thereof, or any substitutes, and all additions thereto, on the maturity of any or all my liabilities, or at any time thereafter, or before, in the event of the said securities depreciating in value, at any public sale or private sale, without advertising the same, or demanding payment, or giving notice, with the right to said Bank and its assigns, themselves, to be the purchasers; and after deducting all costs and expenses, to apply the residue to the payment of any, either or all liabilities as aforesaid, as said payee, or its President, Cashier, or assigns shall elect, returning 'to the undersigned and in case the

proceeds of the sale of said property shall not cover the principal, interest, and expenses, the undersigned engages to pay the said deficiency forthwith after such sale, with legal interest.

Billings, Montana, July 27, 1915.

(Signed) W. F. GUY.

At the time I took over these notes from the Bank of Montana there was a suit pending in the District Court of Cascade County against Van Atta and against Guy and Van Atta on the notes that were taken over by me. As per our agreement these suits were to be dismissed and a new suit instituted, leaving me out altogether, and against Van Atta. The judgment was to be applied on the notes for my benefit. That was partially carried out, later the Van Atta notes were turned over to my wife, that is, they were turned over to me and afterwards I turned them over to my wife. The indebtedness of the Bank of Montana of \$8,221.36 for which I pledged the Morley notes were the ones that I received this notice of sale on. As long as we held possession of the ranch, all taxes were paid. After that, I do not know whether they were paid or not. I am not aware of what Mr. Morley did after he received [76] possession of the ranch. I know he did not pay the first mortgage and it was foreclosed, and that the Montana National Bank was the purchaser. I was given to believe that.

**Testimony of Tisdale I. Van Atta in His Own Behalf
(Recalled).**

T. I. VAN ATTA, recalled as a witness in his own behalf, in answer to the questions put to him testified as follows:

Direct Examination.

(By Mr. McCUE.)

No, sir, at no time, I think, did I get any notice or knowledge that the defendant had sold the notes in controversy under the alleged collateral agreement. The first time I learned that was some time last year. You told me, of course, when you came over to see me in Seattle. That was just previous to the commencement of this suit. I think that was the first time that I ever knew or had any knowledge or information that they had sold these notes I claim in this lawsuit.

Q. Is it true in the transaction whereby Guy became the owner of this property in Great Falls that your partnership matters were settled and disposed of between you and Guy?

Mr. GRIMSTAD.—Objected to for the reason that it is not proper examination; gone into time and again.

The COURT.—You may ask. Partners cannot settle partnership business between themselves without bringing in their creditors in the settlement of the equities that their creditors possess. This Bank at that time had equities in this thing and it is admitted. All statements of settlement will avail you

(Testimony of T. I. Van Atta.)

nothing. He may answer; as between men he may answer. Objection is overruled.

A. I suppose they were, as far as I know, yes. Of course, you still understand I still own a half-interest in those notes; supposed to, in the Morley notes, securities but everything outside of that was settled, —our debts.

(Witness excused.) [77]

Mr. GRIMSTAD.—Your Honor, please, I presume we can take it for granted that the only evidence left to be presented on the part of the plaintiff will be the evidence of Mr. Marhoff with reference to the valuation of this property.

The COURT.—He has so stated.

Mr. GRIMSTAD.—And that being the case, the defendant now moves the Court to enter an order of nonsuit in this action.

The COURT.—In the beginning, counsellor, the Court will state you may make a motion for a directed verdict. There is no such thing as nonsuit in the Federal Court. That has long since been disposed of by decision of the Supreme Court.

Mr. GRIMSTAD.—Comes now the defendant, the evidence on the part of the plaintiff having been presented, and moves the Court to direct the jury to bring in a verdict in favor of the defendant and against the plaintiff, and upon the following grounds, to wit:

First.—The complaint does not state facts sufficient to constitute a cause of action.

Second.—That the proof is wholly at variance with the complaint.

Third.—The evidence shows conclusively that the plaintiff and one W. F. Guy were partners, and still are, in so far as the defendant is concerned.

Fourth.—That any verdict in favor of the plaintiff which the jury might return could not be sustained by the evidence here.

Again,—that the evidence shows that the notes in question have been foreclosed and the parties' interest, if any, then wiped out, both as to the plaintiff and as to W. F. Guy.

Again,—There has been no evidence of any collusion or connivance between Guy and the defendant Bank.

Again,—The complaint is predicated against the Montana National Bank, and the transactions in reference to the notes in question are with the Bank of Montana; there being no proof that the Montana National Bank obligated themselves for the [78] torts, if any, of the Bank of Montana.

Again,—The evidence, both on the part of Van Atta and the complaint, shows conclusively that the action as against the Bank was terminated and that the statute of limitations had run against it, the evidence showing that the defendant Van Atta had knowledge of the transactions in August of 1915 and again in August, 1916.

Further than that, the evidence disclosed that the Bank of Montana, or Montana National Bank converted the collateral security by foreclosing it, and by so doing they did not convert the property but

rather, if the plaintiff has any action at all, it is for an accounting against the defendant Bank, claiming that this property was held in trust for the plaintiff, if he had any remedy.

Again,—There is no evidence here whatever as to the value of these notes, whether they are worth anything.

Furthermore, the plaintiff has failed to allege and prove at any point that there was any tender of the amount that he owed, and that he either owes the Bank of Montana or Guy, and he cannot come into court and sue the Bank of Montana for torts of Guy for what Guy might have done, without offering to pay for what he owes.

And, your Honor, please, I think the authorities that we have on this absolutely bear it out.

Mr. McCUE.—Does your Honor care to hear?

The COURT.—I will hear you briefly, but my own conviction is that the motion must be granted, on the ground that you have not chosen the proper remedy. It lies in an accounting between yourself—Guy, and this defendant; and also the bar of the statute seems conclusive here. If there is really a conversion, you have no case anyway.

The COURT.—Which statute of limitations is it?

Mr. GRIMSTAD.—Yes, I desire to amend, if your Honor please, it should be the same subdivision, but 6449 [79] rather than 6447, and it is two years instead of three. I would like to have that amendment made.

The COURT.—The amendment will be made by interlineation.

The COURT.—You may call in the jury.

Gentlemen of the jury, the evidence for the plaintiff being in, counsel for the defense—as you know—has moved for a directed verdict in his behalf, or its behalf, on the theory that there is not sufficient evidence for various reasons to support the case of the plaintiff, to uphold a verdict in the plaintiff's behalf, if any was by you rendered. It therefore becomes merely a question of law for the Court, a question of law for the Court whether that position taken by the attorney for defendant is sound; then if it is, there is nothing for the Court to do but simply to direct a verdict in behalf of the defendant. And so, as you are a part of the court, an equal part with the Judge, you are called in so you may hear the disposition of the case, if you desire.

This case was originally brought in this court in March, 1920, and its original theory was that of conversion of personal property, Morley notes, by the defendant, which the defendant claimed to be the owner of. The complaint was indefinite and it was demurred to; also in the complaint were various allegations of firm property, of partnership property. The Court sustained the demurrer because the complaint was too indefinite to determine what its theory was or just what the facts were. And in its decision it was careful to point out that if this was firm property and partnership property, involving a partnership, the only remedy of plaintiff was a suit in equity, or an accounting in which the partners and also the creditor holding the Morley notes would be made parties so there might be an accounting and taking note of all claims cross and otherwise, to settle

all of the equities and various claims in one suit. Partnership affairs are always settled in equity, as being more suitable to the nature [80] of partnerships and accounting and more easy because it is easier to handle accounts before the Court, the Court being privileged to take them and study over them after the case is concluded, than to submit them to the jury.

Thereupon the plaintiff in this action brought an amended complaint, a straight suit for conversion, in which the question of partnership and firm property was not referred to at all but he was claimed to be simply a half owner in the Morley notes and that they had been converted by Guy and this defendant in collusion in order to deprive the plaintiff of his interest therein.

From that and from the brief filed on yesterday in support of the plaintiff's resistance to a motion to direct a verdict on the pleadings, the Court was well satisfied that this complaint was drawn with some idea of strategy. I have sat in court for a long time, but I have never known any strategy in court but a fair, open plain statement of the facts as they exist, and to come into court and present them and the law applicable to them, in a logical and consistent manner; because if we are set afloat on the troublous sea of litigation upon the vessel of strategy we are liable, before the end, to be submarined and torpedoed by the facts and sunk to the bottom.

The defendant denied the conversion and set up considerable relating to the transaction with the Bank of Montana, and denied it had any part in the

conversion. Curiously enough, there are none of the pleadings that refer to the Bank of Montana to show that it is connected with this suit or with the defendant, but it seems, it is now plain, the defendant is now the successor of the Bank of Montana. We will pass that over.

But when the evidence comes into court we find this situation: This plaintiff and one Guy were partners in the operation of a ranch and they incurred debts—partnership debts—to the Forsyth Bank and to the Bank of Montana at Billings. They had sold their ranch finally, on which they were operating, [81] and took on it a second mortgage to secure what was due them apparently upon it. They gave their notes to the Forsyth Bank apparently for debts that they owed it, and they pledged the Morley notes, that were their partnership notes, to secure their own notes to the Forsyth Bank. At this time the plaintiff was also personally indebted to the Billings Bank, rather than the partnership being indebted to it. In due time the Bank of Forsyth foreclosed on the note of Guy and plaintiff and sells his collateral, the Morley notes, which were to secure the notes of Guy and the plaintiff.

Now, it is wholly immaterial whether it was a sale or whether it was an assignment, because the Billings Bank got those notes and succeeded either to a complete title or to all the rights of the Forsyth Bank; it is immaterial for the purpose of this motion; so, upon the evidence as it stands here now the Bank of Billings purchased the notes at the foreclosure sale of the Forsyth Bank. At that time

the Bank of Billings had the Morley notes and had the notes of Van Atta and Guy and the plaintiff Van Atta's individual notes. They had brought some suit, apparently up in this county. It seems the partners had some property here, property they had taken in the sale of their own ranch, and partnership property, real estate, bought with partnership funds. At this time Guy goes down to the Billings Bank and makes an arrangement with it. He gives his individual note for all of the Morley notes and for the partnership note of Guy and plaintiff to the Billings Bank and also for plaintiff's personal notes to the Bank; in other words, by his note the parties treated it as a purchase by Guy and a payment by Guy of both the partnership indebtedness and plaintiff's personal indebtedness to the Billings Bank, and Guy gets the Morley notes. Thereupon he turns them back to the Billings Bank as a pledge to secure his own eight thousand dollar note to the Billings Bank, which he gave in payment of the partnership debt and personal debt of the plaintiff in this action. When Guy paid the partnership debt and the personal debt of the plaintiff, as a matter of law [82] he was subrogated to the rights of the Billings Bank and the Forsyth Bank, too.

At any rate, Guy was in this double position: He had the notes impressed with the partnership's rights and in which he had a personal equity, and he had them also impressed with his personal right, by virtue of having paid the plaintiff's personal debt.

Now, when he turned these notes back to the Billings Bank, the Morley notes, he turned back his equities. In other words, the Billings Bank succeeded to the rights that he had in the Morley notes: The right to hold them until the partnership was settled and the partnership debts were paid, and the right to any surplus there might be in those notes, in behalf of Guy. Guy, remember, had paid some eight thousand dollars, for which the plaintiff was obligated for the greater part—six thousand were partnership debts and two thousand the plaintiff's personal debt. So, whatever he had in the partnership notes he transferred to this defendant bank; we will say it is his successor. So this defendant, then, had an interest in the partnership, that is to say, an equity in the property, upon which it had a right to rely for the payment of its claim against Guy, in so far as that equity would work out into money for the benefit of Guy when the partnership affairs were settled.

Now, that partnership has never been settled, because partners cannot go out together and settle their debts without taking into account all partnership property wherever situate and all those who have claims and equities in that property, as the defendant bank had. As a matter of fact, there has never been any settlement of the partnership. Because a witness on the stand says it is settled, when the facts show otherwise, means nothing, or means nothing in the face of facts and [83] principals involved. The original notes have never been paid; the notes of the plaintiff which Guy's wife still

holds have never been paid. Whatever the nature of the settlement between Guy and defendant is, this defendant had a right to be made a party here so its equities could be worked out, which has not been done. All of that can be done in a court of equity for an accounting, for settlement of partnership claims, not only between themselves, but between themselves and this defendant, that has an equity in some of the partnership property. And it follows in a court of law before a jury that the plaintiff cannot maintain such a suit.

In respect to this partnership property, it is true that one partner cannot sell the other partner's interest in partnership property, or dispose of it, but he can dispose of his own interest in the property; and no one will ever know what his own interest is until the partnership has been settled and the debts all paid, and then the two partners have their respective interests in the surplus; and that is the situation here.

Furthermore, if one partner does assume, as here, to pledge partnership property for his partnership debts as well as personal debts, or for personal debts, the rule is just the same; one partner cannot sue to recover that back alone; this plaintiff couldn't sue alone to recover it back, even if the debts were all paid; it takes joint owners to sue for recovery of joint property.

So the motion of the defendant will be granted, and the Clerk will enter up a verdict in behalf of the defendant; if plaintiff has any rights in this property he can still work it out in a suit in a court

of equity in an accounting between the parties, the defendant and any creditors there may be.

Mr. McCUE.—We respectfully take an exception.

The COURT.—The exception will be noted.

The COURT.—Thirty days will be allowed for bill of exceptions. [84]

Dated this 4th day of January, A. D. 1921.

T. F. McCUE.

Attorney for Plaintiff.

NOTICE.

To the Above-named Defendant, The Montana National Bank and Its Attorneys, Grimstad & Brown and J. W. Speer:

You and each of you will please take notice:

Herewith is served upon you the plaintiff's proposed bill of exceptions in the foregoing case, and the same will be presented to the District Judge of said court for settlement and allowance in accordance with the rules of said court.

Dated this 4th day of January, A. D. 1921.

T. F. McCUE,

Attorney for Plaintiff.

Service of the foregoing bill of exceptions is hereby admitted and copy received this 4th day of January, 1921.

GRIMSTAD & BROWN and
J. W. SPEER,

Attorneys for Defendant.

Stipulation Re Bill of Exceptions.

It is hereby stipulated by and between the parties to the foregoing action, thru their respective

counsel of record, that the foregoing bill of exceptions of the plaintiff herein clearly sets forth the testimony proceedings had upon the trial of said cause necessary for the purpose of presenting said cause to the Circuit Court of Appeals upon the writ of error, and that the same may be signed, settled, allowed and filed as and for the bill of exceptions of the plaintiff herein.

Dated this 4th day of January, 1921.

T. F. McCUE,

Attorney for Plaintiff.

GRIMSTAD & BROWN and

J. W. SPEER,

Attorneys for Defendant. [85]

Certificate of Judge to Bill of Exceptions.

Inasmuch as none of the aforesaid matters appear in the record of this court, the Honorable George M. Bourquin, Judge of said court, and who presided on the trial of said cause, having examined this bill of exceptions and found the same, after corrections by him made, conformable to the truth, has hereunto caused the same to be settled, allowed, certified, as and for the bill of exceptions of the plaintiff herein, and as containing all of the evidence proceedings herein necessary to enable the Circuit Court of Appeals to consider said cause of action upon writ of error, and the same is hereby ordered to be filed in said cause as such bill of exceptions and made a part of the record therein.

Dated this 22d day of January, A. D. 1921.

BOURQUIN,
Judge.

Filed Jan. 22, 1921. C. R. Garlow, Clerk. [86]

Thereafter, on Feb. 19, 1921, petition for writ of error was filed herein as follows, to wit:

In the District Court of the United States for the
District of Montana.

TISDALE I. VAN ATTA,

Plaintiff,

vs.

THE MONTANA NATIONAL BANK,

Defendant.

Petition for Writ of Error.

Now comes the plaintiff herein, Tisdale I. Van Atta, and says: That on or about the 29th day of December, 1920, this Court made, gave and entered judgment herein in favor of the defendant and against the plaintiff, in which judgment and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of this plaintiff, all of which will more fully and in detail appear from the assignments of error, which is filed with this petition.

WHEREFORE, plaintiff prays that a writ of error may issue in his behalf to the United States Circuit Court of Appeals for the Ninth Judicial District for the correction of errors so complained

of and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to said Court of Appeals.

Dated this 19th day of February, A. D. 1921.

T. F. McCUE,
Attorney for Plaintiff.

Service of the foregoing petition for writ of error is hereby admitted and copy of the same received, this 19th day of February, A. D. 1921.

GRIMSTAD & BROWN,
J. W. SPEER,
Attorneys for Defendant.

Filed Feb. 19, 1921. C. R. Garlow, Clerk. [87]

Thereafter, on Feb. 19, 1921, assignment of errors was duly filed herein, as follows, to wit:

In the District Court of the United States for the
District of Montana.

TISDALE I. VAN ATTA,

Plaintiff,

vs.

THE MONTANA NATIONAL BANK,

Defendant.

Assignments of Error.

The plaintiff in the above-entitled action says that there is manifest error in the record herein, and under section 6784, R. C. Montana, as amended by the Session Laws of 1915, which reads as follows:

“Every ruling, order, and decision of any kind or nature, and every verdict, finding, decree or judgment, is to be deemed accepted and it shall not be necessary to ask for or note an exception, and no bill of exceptions need be settled or filed except where and when hereafter expressly required by law or by a rule of the Supreme Court.”

And assigns the following as such:

I.

The Court erred in overruling the plaintiff's objection to the question asked upon cross-examination of plaintiff as follows:

“Yes, in your letter of August 27, 1916, you say, ‘As I understand the matter, however, it is all eliminated by Guy giving you his note for the whole thing.’ You knew, then, a considerable time before you saw Mr. McCue in Seattle, or in Washington some place, that your interests in these notes had been foreclosed or sold out under the collateral pledge agreement, did you not?

The COURT.—Sold out under what agreement?

Q. Under the agreement, pledge agreement, with Dr. Guy and also the pledge agreement with the First National Bank of Forsyth. [88]

Mr. McCUE.—At this time we object to this line of evidence as being incompetent, immaterial, and there is no proper evidence going to show that any foreclosure was ever made as outlined in the evidence thus far, and is calling

for conclusion, opinion, of the witness on a matter that is not within the issues of this case, and also that the inquiry is not proper cross-examination.

The COURT.—He testified he did not know until he met counsel of plaintiff, and his ownership, that is one of the main issues in the case. The question is proper cross-examination. He may answer. Overruled.

Exception noted and allowed.”

(Bill of Exceptions, page 11.)

II.

The Court erred in overruling plaintiff's objections to the following question:

“Q. This last exhibit reads as follows: ‘The only answer that we can make, as the matter now stands, is that Dr. Guy was indebted to the Bank of Montana for about \$8,000.00 and as security for that, Dr. Guy put up with the Bank of Montana the Morley notes. Dr. Guy failed to pay the note when due, and the collateral was then sold by the bank, so that, as it now stands, the bank is the holder of the Morley notes.’ You knew on that date, or a few days after that, that the Bank of Montana had taken over the Morley notes from Dr. Guy, did you not?

Mr. McCUE.—Objected to as argumentative and incompetent and intended to place a construction upon a plain letter.

The COURT.—He can answer if he can; objection overruled. I think he will make more

progress if he can rely on the language of the letter.

Exception noted and allowed."

(Bill of Exceptions, page 12.) [89]

III.

The Court erred in admitting the following evidence, over plaintiff's objection:

"Q. Did you redeem under the sale of the first mortgage?

Mr. McCUE.—Objected to—incompetent, immaterial and irrelevant; furthermore, there was no obligation in view of the records in this case, the plaintiff's notes having been converted, no obligation for him to redeem.

The COURT.—He may answer.

Exception noted and allowed.

A. No.

Q. You never made any effort to, did you?

Mr. McCUE.—Same objection as above.

The COURT.—Like ruling.

Exception noted and allowed.

A. No, sir.

Q. Did you ever inquire as to what amount it would take to redeem?

Mr. McCUE.—Same objection as last above.

The COURT.—I doubt whether the details are material; he may answer.

Mr. McCUE.—Note an exception."

(Bill of Exceptions, page 18.)

IV.

The Court erred in sustaining the defendant's objections as follows:

A. I understood as stated; I understood that the Bank of Montana had taken over those papers or securities from the First National Bank of Forsyth. Inasmuch as they had—may I say this, your Honor?

The COURT.—Proceed.

A. (Contd.) Inasmuch as they had agreed to protect me and take [90] care of my interests—

Mr. GRIMSTAD.—To which we object when the agreement between him and the bank protecting his interests is not in question, nothing in writing shown, and nothing here to indicate that the plaintiff is suing for an accountable wrong of any rights he may have had.

The COURT.—Objection will be sustained.

The Great Falls property was settled between Dr. Guy and myself.

A. Have you got any accounts pending now, any partnership that is, accounts with any bank in the name of the firm, or did you have at the time of the commencement of this action?

Mr. GRIMSTAD.—Objected to as incompetent, irrelevant and immaterial, nor proper re-direct examination.

The COURT.—Sustained.

Exception noted and allowed.”

(Bill of Exceptions, page 19.)

V.

The Court erred in sustaining the defendant's objection to the introduction of the following evidence:

“Q. Tell the jury what was said between yourself and Mr. Langworthy.

Mr. GRIMSTAD.—That is objected to—incompetent, irrelevant and immaterial.

The COURT.—What is the object of this?

Mr. McCUE.—The object, if your Honor please, is that in the pleadings, and, in a way, in cross-examination, it was claimed by the defendant in this case that there was a sale, a foreclosure in that transaction, and our contention being that the Bank of Montana merely succeeded to the interests of the First National Bank of Forsyth, that it did not in fact constitute a foreclosure or an extinction of the title to the collateral security in the plaintiff.
[91]

The COURT.—The objection will be sustained.

Exception noted and allowed.

Q. What was done when you got down to the First National Bank of Forsyth by yourself and Mr. Brown, a member of the firm of Grimstad & Brown, representing the Montana National Bank—Bank of Montana, and the officers of the bank, and the First National Bank of Forsyth?

Mr. GRIMSTAD.—Objected to as immaterial.

The COURT.—The objection will be sustained. If ever anything of this sort will be material, it is not now.

Exception noted and allowed.

A. After my return from Forsyth I went over to the Bank of Montana by prearrangement.

Q. What was done there, if anything, with reference to the notes involved in this lawsuit?

Mr. GRIMSTAD.—That is objected to, incompetent, irrelevant and immaterial.

The COURT.—What is the object of this?

Mr. McCUE.—I want to show the actual transaction that took place, along the line that we contend for in the lawsuit, that the taking over of the notes by this witness and the repledging of them was a transaction without any sale and still preserved the title in the plaintiff to the notes in question.

The COURT.—I find nothing in your complaint. You start off with the fact that these two men owned these notes and that this plaintiff pledged them for his debt.

Mr. McCUE.—That is true; we take it this is a part of the evidence?

The COURT.—Proceed; objection sustained to the last question.

Exception noted and allowed.”

(Bill of Exceptions, page 20, 21, 22.) [92]

VI.

The Court erred in sustaining the defendant's motion for a directed verdict.

(Bill of Exceptions, page 44.)

VII.

The Court erred in entering judgment against the plaintiff herein.

VIII.

The Court erred in overruling plaintiff's petition for a new trial herein.

Dated this 19th day of February, A. D. 1921.

T. F. McCUE,

Attorney for Plaintiff.

Service of the foregoing assignments of error is hereby admitted this 19th day of February, 1921, and copy of the same received.

GRIMSTAD & BROWN,

J. W. SPEER,

Attorneys for Defendant.

[Indorsed on the back]: #816. Title of Cause. Assignment of Errors. Filed Feb. 19, 1921. C. R. Garlow, Clerk. [93]

Thereafter, on Feb. 19, 1921, order allowing writ of error was entered herein as follows, to wit:

In the District Court of the United States for the District of Montana.

TILDALE I. VAN ATTA,

Plaintiff,

vs.

THE MONTANA NATIONAL BANK,

Defendant.

Order Allowing Writ of Error, Supersedeas and Fixing Bond.

On this 19th day of February, 1921, came the plaintiff above named by his attorney and filed and

presented to this Court his petition praying for the allowance of a writ of error and supersedeas herein, and filed and presented to this court assignments of error intended to be urged by him; praying also that a transcript of the record and the proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial District, and that such order and further proceedings may be had as may be proper in the premises.

IN WITNESS WHEREOF the Court does allow the writ of error prayed for.

IT IS FURTHER ORDERED that the amount of the security herein shall be fixed at the sum of Three Hundred Dollars (\$300.00); that upon the making and filing with the clerk of this court a good and sufficient undertaking in said sum by said plaintiff, all further proceedings herein be superseded and stayed until the final determination of said appeal by the said Circuit Court of Appeals, and until further order of this Court.

IT IS FURTHER ORDERED that a transcript record of all proceedings had in said cause be submitted to the clerk of the United States Circuit Court of Appeals for the Ninth Judicial District.

Dated this 19th day of February, A. D. 1921.

BOURQUIN,

Judge.

Filed Feb. 19, 1921. C. R. Garlow, Clerk. [94]

Thereafter, on Feb. 19, 1921, praecipe for transcript was filed herein as follows, to wit:

In the District Court of the United States for the
District of Montana.

TISDALE I. VAN ATTA,

Plaintiff,

vs.

THE MONTANA NATIONAL BANK,

Defendant.

Praecipe for Transcript of Record.

To Honorable C. R. GARLOW, Clerk of the
Above-entitled Court:

You will please prepare transcript of the record of this cause, to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, under appeal heretofore presented to said court, and include in said transcript the following pleadings and papers now on file in your office, to wit: Amended complaint, the answer to amended complaint, replication to the answer, judgment, petition for new trial, order overruling petition for new trial, bill of exceptions, petition for writ of error, assignment or errors, order allowing writ of error, writ of error and citation.

T. F. McCUE,

Attorney for Plaintiff in Error.

[Endorsed on the back]: No. 816. Title of Cause. Praecipe for Printing Transcript. Filed Feb. 19th, 1921. C. R. Garlow, Clerk. By H. H. Walker, Deputy Clk. [95]

Thereafter, on Feb. 23, 1921, bond on writ of error was filed herein as follows, to wit:

In the District Court of the United States for the
District of Montana.

TISDALE I. VAN ATTA,

Plaintiff,

vs.

THE MONTANA NATIONAL BANK,

Defendant.

Bond on Writ of Error.

WHEREAS, the above-named plaintiff has sued out of this court a writ of error to the Circuit Court of Appeals of the Ninth Circuit, from the judgment and order of this Court rendered herein; and,

WHEREAS, this Court has fixed the amount of the bond to be given on the part of the plaintiff pursuant to the suing out of said writ of error, and has fixed the same in the penal sum of Five Hundred (\$500.00) Dollars,—

Now, therefore, we, the undersigned, Tisdale I. Van Atta, as principal, and the United States Fidelity & Guaranty Company, a corporation, of Baltimore, Maryland, as surety, do hereby undertake and agree to and with the defendant, the Montana National Bank, that the plaintiff will pay to the defendant all costs and damages that may be awarded in its favor and against the plaintiff by reason of the suing out and the issuance of the

writ of error aforesaid, whether the same be by reason of an affirmance in whole or in part of the judgment of this Court rendered in said judgment, not exceeding, however, the sum of Five Hundred (\$500.00) Dollars, and for the payment of said sum we bind ourselves, our heirs and assigns, and agree that the same shall be paid well and truly, in lawful money of the United States.

Dated this 21st day of February, A. D. 1921.

TISDALE I. VAN ATTA.

By T. F. McCUE,

His Attorney.

UNITED STATES FIDELITY & GUAR-
ANTY COMPANY.

[Seal]

By B. P. McNAIR,

Attorney in Fact.

[Indorsed on the back]: #816. Title of Cause.
Undertaking on Writ of Error. Filed Feb. 23.
1921. C. R. Garlow, Clerk. [96]

On February 19, 1921, citation was issued herein, which original citation is hereunto annexed and is in the words and figures following, to wit: [97]

In the District Court of the United States for the
District of Montana.

TISDALE I. VAN ATTA,

Plaintiff,

vs.

THE MONTANA NATIONAL BANK,

Defendant.

Citation on Writ of Error.

The United States of America to The Montana National Bank, a Banking Corporation, of Billings, Montana, Defendant, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit in the City of San Francisco, California, thirty (30) days from and after the date of this citation, pursuant to a writ of error filed in the office of the Clerk of the District Court of the United States, for the District of Montana, wherein the plaintiff above named is plaintiff in error, and you, the defendant above named, are defendant in error, to show cause, if any there be, why the said judgment made, given, rendered and filed against plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Dated this 19th day of February, 1921.

BOURQUIN,
Judge.

Service of the foregoing citation of writ of error is hereby admitted and copy of the same received this 19th day of February, 1921.

GRIMSTAD & BROWN,
J. W. SPEER,
Attorneys for Defendant. [98]

[Endorsed]: #816. Tisdale I. Van Atta vs. Montana Nat. Bank. Citation. Filed Feb. 19, 1921. C. R. Garlow, Clerk. [99]

On February 19, 1921, a writ of error was duly issued herein, which original writ of error is hereunto annexed and is in the words and figures following, to wit: [100]

In the District Court of the United States for the
District of Montana.

TISDALE I. VAN ATTA,

Plaintiff,

vs.

THE MONTANA NATIONAL BANK,

Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States of America, the
Judge of the District Court of the United
States, for the District of Montana, GEORGE
M. BOURQUIN, GREETING:

Because of the record and proceedings and also the rendition of the judgment of a plea which is in said District Court before you, between Tisdale I. Van Atta, plaintiff, and The Montana National Bank, a banking corporation of Billings, Montana, defendant, a manifest error hath happened to the great damage of the said Tisdale I. Van Atta, as is seen and appears by the complaint. We being willing that such error, if any hath been, should be *duly and just* and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then, under your seal,

distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, at the courtrooms of the said court in the Federal Building in the city of San Francisco, California, together with this writ, so that you have the same at said place, before the Justices aforesaid, on the 21st day of March, 1921; that the record and proceedings aforesaid being inspected, the said Justices of the said Circuit Court of Appeals may cause further to be done therein to correct the error what of right and according to the law and custom of the United States ought to be done. [101]

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 19th day of February, in the year of our Lord one thousand nine hundred and twenty-one.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court.

[Seal]

C. R. GARLOW,

Clerk of the District Court of the United States of America, for the District of Montana.

Granted and allowed by:

BOURQUIN,

Judge.

Service of the foregoing writ of error is hereby admitted and copy of the same received this 19th day of February, 1921.

GRIMSTAD & BROWN,

J. W. SPEER,

Attorneys for Defendant.

Answer of Court to Writ of Error.

The answer of the Honorable, the Judge of the District Court of the United States for the District of Montana, to the foregoing writ:

The record and proceedings whereof mention is within made with all things concerning the same, I hereby certify under the seal of said District Court, to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, in a certain schedule to this writ annexed, at the day and place therein contained, as within I am commanded.

By the Court.

[Seal]

C. R. GARLOW,
Clerk. [102]

[Endorsed]: #816. Tisdale I. Van Atta, vs. Montana Nat. Bank. Writ of Error. Filed Feb. 19, 1921. C. R. Garlow, Clerk. [103]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 103 pages, numbered consecutively from 1 to 103, inclusive, is a true and correct transcript of the rec-

ord and proceedings in said cause, and the whole thereof, as appears from the original records and files of said court in my custody as such clerk. And I do further certify that I have annexed to said transcript and included within said pages the original citation and writ of error issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Forty-six and 85/100 Dollars (\$46.85), and have been paid by the plaintiff in error.

Witness my hand and the seal of said court at Great Falls, Montana, March 16th, 1921.

[Seal]

C. R. GARLOW,
Clerk. [104]

[Endorsed]: No. 3663. United States Circuit Court of Appeals for the Ninth Circuit. Tisdale I. Van Atta, Plaintiff in Error, vs. The Montana National Bank, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Filed March 21, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.